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THE NEW YORK  
SUPREME COURT REPORTS.

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CASES DETERMINED  
IN THE  
SUPREME COURT  
OF  
NEW YORK  
FROM  
NOVEMBER, 1873, TO MARCH, 1874.

EDITED BY  
ISAAC GRANT THOMPSON AND ROBLEY D. COOK

VOL. II.

KFN  
5048  
A19  
1873

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ALBANY:  
JOHN D. PARSONS, JR., PUBLISHER.  
1874.

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## CORRIGENDA.

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The Court of Appeals has passed upon cases heretofore published in these reports as follows:

*Armsby v. People*, vol. II, p. 157: Judgment affirmed, sub nom. *Kelly v. People*.

*Astor, Petition of*, vol. II, p. 488: Order affirmed.

*Brinkley v. Brinkley*, vol. II, p. 501: Appeal dismissed.

*Campbell v. Cothran*, vol. I, p. 70: Judgment affirmed.

*Chapman v. Erie Railway Co.*, vol. I, p. 526: Judgment reversed and new trial granted.

*Collins v. Hasbrouck*, vol. I, p. 86: Judgment reversed and new trial granted.

*Cook v. Soule*, vol. I, p. 116: Judgment affirmed.

*Couch v. Parker*, vol. I, Addenda, p. 1: Judgment affirmed.

*Coughtry v. Globe Woolen Company*, vol. I, p. 452: Judgment reversed and new trial granted.

*Crocheren v. N. Shore, etc., Ferry Co.*, vol. I, p. 446: Judgment reversed and new trial granted.

*Dewey v. Dewey*, vol. II, p. 515: Appeal dismissed.

*Folsom, Petition of*, vol. II, p. 55: Order affirmed.

*Foot v. People*, vol. II, p. 216: Judgment reversed and proceedings remanded.

See 9 A. L. J. 246.

*Hoffnagle v. N. Y. Cent. & H. R. R. Co.*, vol. I, p. 346: Judgment reversed and new trial granted.

*Hull v. Ruggles*, vol. I, p. 18: Judgment affirmed.

*Kiah v. Greuter*, vol. I, p. 388: Judgment affirmed.

*Nichols v. Tiff*, vol. II, p. 314: Judgment reversed and new trial granted.

*People ex rel. Alkin v. Morgan*, vol. I, p. 101: Judgment reversed and proceedings of assessors vacated.

*People ex rel. Judson v. Thacher*, vol. I, p. 158: Appeal dismissed.

*People ex rel. Parker v. County Court of Jefferson*, vol. I, p. 603: Judgment affirmed.

*Piper v. N. Y. Cent., etc., R. R. Co.*, vol. I, p. 290: Judgment affirmed.

*Robinson v. Phillips*, vol. I, p. 151: Judgment affirmed.

*Rogers v. Long Island R. R. Co.*, vol. I, p. 396: Judgment affirmed.

*Sanford v. White*, vol. I, p. 647: Order affirmed.

*Standish v. Parmely*, vol. I, p. 40: Judgment affirmed.

*Torrance v. Conger*, vol. I, Addenda, p. 18: Judgment affirmed.

*Vanderwalker v. Oemer*, vol. I, p. 50: Appeal dismissed.

*Woods v. People*, vol. I, p. 610: Judgment reversed and new trial granted.

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CASES  
DETERMINED IN THE  
SUPREME COURT  
OF THE  
STATE OF NEW YORK.

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FIRST JUDICIAL DEPARTMENT.

GENERAL TERM, OCTOBER, 1873.\*

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HOLYOKE *et al.* v. ADAMS *et al.*, appellants.

*Attachment — undertaking — bankruptcy proceedings, when attachment not avoided by — conflict of jurisdiction.*

In December, 1869, plaintiffs attached property belonging to defendants. The attachment lien was dissolved by defendants giving an undertaking in pursuance of the statute. The action in which the attachment was issued was defended, and, pending its continuance, in October, 1873, defendants were adjudicated bankrupts. Upon a motion to stay proceedings in the action until defendants' discharge in bankruptcy, *held*, that more than four months having elapsed, the attachment could not be invalidated under section 14, U. S. Bankrupt Law, and that the result of the attachment was a vested right, subject only to the right of the debtor to substitute an undertaking prescribed by law.

*Held*, also, that the sureties in the undertaking, having assumed the payment of the debt alleged, when established, in consideration of the delivery of the attached property, became the debtors of the plaintiffs, on condition that their demand was proven and judgment obtained, and the plaintiffs were

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\* The decisions in the following cases were filed in December, 1873.

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 Holyoke v. Adams.
 

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entitled to prosecute the action to judgment, notwithstanding the proceedings in bankruptcy.

Whether the provision of section 14 of the Bankrupt Law relating to the dissolution of process issued by State courts is constitutional, *quære?*

APPEAL from an order made at special term denying the defendants' motion for a stay of proceedings pending the application of the defendants for their discharge in bankruptcy, so far as to allow the plaintiffs to proceed to judgment.

The action was brought in December, 1869, to recover the sum of \$2,200 on a special agreement. The defense was a general denial. The case was referred to Hon. H. C. Van Voorst, and is still pending. During an adjournment of the case, on October 8th, 1872, the defendants were adjudicated bankrupts in the U. S. district court for Massachusetts.

On December 2d, 1869, certain property of defendants was seized by the sheriff under an attachment issued against defendants as non-residents. The attachment lien was dissolved in the usual manner, on defendants giving security by the undertaking of two residents. The point at issue is, whether the plaintiffs are barred by any provision of the bankrupt law from proceeding to judgment against defendants, in order to pursue their remedy against the sureties.

*Erastus Cooke*, for appellants, cited U. S. Bankrupt Act, § 21; Bump's Practice in Bankruptcy, 148, 331, 338; *Carpenter v. Tarrell*, 100 Mass. 450; Code, § 21.

*Edward D. McCarthy*, for respondents, cited U. S. Bankrupt Act, §§ 14, 20; 2 Bankr. Reg. 125; *id.* 138; 4 *id.* 5; 2 Ben. D. C. 44; 99 Mass. 376; 7 Bankr. Reg. 1; 1 *id.* 204; 38 How. 341; 8 Abb. (N. S.) 220; 1 Woodworth, 324; 4 Binn. 269.

BRADY, J. In this case the proceedings in bankruptcy were not commenced within four months after attachment was granted, and the attachment, if it had been continued, would not, therefore, have been dissolved by operation of the bankrupt law. The fourteenth section declares only that attachments made within four months next preceding the commencement of such proceedings shall be dissolved. The result of the attachment is a vested right, which is to have the property seized applied to the extinguishment of the

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Holyoke v. Adams.

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debt, subject, however, to the right of the debtor to substitute an undertaking prescribed by law. The plaintiff, by attaching property, acquires a specific lien upon the debtor's interest, and is entitled like a judgment creditor to impeach the colorable title of a fraudulent mortgage. *Rouche v. Striker*, 26 How. 73; *Frost v. Mott*, 44 N. Y. 253. The execution and delivery of such an undertaking to release the property should be held in legal contemplation to be a part and in continuation of the attachment proceedings. The propriety of this is apparent from the obligation assumed by the sureties, which is to pay any judgment that may be recovered in the action, the sureties thus agreeing to do exactly what the property seized would do when applied, namely, pay the judgment obtained, and also from the presumption that the property levied upon would have remained in *statu quo* until the judgment was recovered, if the undertaking had not been given. The application of this principle in this case would protect the plaintiff from the intervention of a power by which he might otherwise be deprived of a substantial right, acquired by superior diligence, under the laws of the State. The character of the undertaking, its subject, office and purpose, however, leave no doubt that it is a substitute for the levy under the attachment which is in effect continued, although the process is discharged. There is another view of this question, which may be stated thus: The undertaking having been given, the sureties assumed the payment of the debt alleged when established by process of law, and they became the debtors of the plaintiff on condition that the demand was proven and judgment for it obtained. This obligation rests upon, and the consideration is, the delivery of the property seized, a delivery predicated entirely of their promise to pay the claim for the discharge of which the property released was seized. Their liability, therefore, depends upon whether the debtor at the time of the giving of the undertaking was lawfully indebted to the plaintiffs, and, to ascertain that, the judgment must be recovered, for such, as already suggested, is the condition of the obligation assumed by them. If this view be correct, it is immaterial whether the debtor has been discharged from his indebtedness or not by subsequent proceedings. Such a result would not affect the liability of the sureties whose undertaking related to an existing liability, which, as soon as determined, made their promise absolute. For these reasons, in addition to those already given, the order of the special term should be affirmed.

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 Rice v. Harbeson.
 

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This appeal is thus disposed of, without considering whether the fourteenth section of the bankrupt act is constitutional — whether, when the jurisdiction of a State court has been invoked, and rights have been secured under it, they can be taken away by proceedings in another court under the provisions of the constitution of the United States. It might not be difficult to solve this problem, although it has been held in proceedings in bankruptcy that congress has the power by operation of a general bankrupt law to divest the conditional lien acquired by levy of an attachment. Bump on Bankruptcy (5th ed.), 329, and cases cited. We have examined, but do not feel bound to follow, the cases cited on the argument which were decided in the courts of Massachusetts.

INGRAHAM, P. J., and FANCHER, J., concurred.

*Order affirmed.*

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RICE, executor, etc., appellant, v. HARBESON *et al.*

*Mortgages — holder of mortgage against estate of deceased person — conflict of law — personal property — lex rei sita.*

A citizen of New York died leaving personal property there and real estate situate in South Carolina which was mortgaged. He left a will wherein he directed his estate to be divided among persons therein named. The will was proved in New York and also in South Carolina; in the latter State as a will of personal property only, it not being properly executed to convey real estate, and the real estate descended to the heirs. The heirs, by suit in South Carolina, recovered the real estate and obtained a decree that the executor under the will pay the mortgage out of the personal property. Afterward the executor petitioned the surrogate of New York for a final accounting, and cited the holder of the mortgage who appeared and filed his claim.

*Held*, that the mortgage creditor was not compelled, by 1 R. S. 749, § 4, to resort for payment to the land in the first instance, but might either foreclose the mortgage or resort to the personal property. *Roosevelt v. Carpenter*, 28 Barb. 426, followed.

The object of the statute in question was not to interfere with the rights of the mortgage creditor, but to establish an equitable rule among the heirs and devisees.

A court of equity, however, can compel the mortgage creditor to first exhaust his remedy against the mortgaged property, before resorting to the personal estate.

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Rice v. Harbeson.

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In this case, the existence of a judgment in a court of South Carolina, decreeing payment of the mortgage out of the personal estate, will not accomplish such object here. The judgment has no extra territorial force, and only applies to personal property situated in South Carolina.

A nation within whose territory personal property is situated has as entire dominion over it, while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.

THIS is an appeal from part of a decree of the surrogate of New York county upon final accounting.

James Murdock was a citizen and resident of New York when he died, on the 10th June, 1869. In his will he appointed John A. Rice (the appellant) and John Murdock his executors and trustees, "with power to bring all I may die possessed of in America into a divisible shape," and "after all my just debts are paid," to divide the estate into seven shares, and to distribute the shares among his sisters, nephews and neices, naming them.

The testator's estate consisted, at the date of the will, of money, stock, bonds and other personal property of the value of about \$17,436.72, and of one lot and building thereon, situated in the city of Charleston, South Carolina.

After the execution of the will, and on or about the 1st of February, 1869, the testator purchased another piece of real estate in the city of Charleston, South Carolina, for which he paid the aggregate sum of \$19,000, as follows: cash, \$13,000, and executed and delivered to the grantor, Agnes Calder, executrix, etc., a bond and mortgage for \$6,000. This mortgage and bond was subsequently assigned by Mrs. Calder to one Forsythe, who afterward, and on the 15th of January, 1872, assigned it, together with the bond, to John Harbeson, one of the respondents.

The testator died seized and possessed of all of the above property. His will was proved in New York as a will of real and personal property, and in South Carolina as a will of personal property only—the laws of that State requiring a will of real estate to be executed before three witnesses, and the testator's will having only two witnesses—and the real estate above mentioned descended to the heirs.

All of the legatees mentioned in the will are aliens except the children of Jane Harbeson, viz.: David Harbeson, Ellen Harbeson and Mary Harbeson, respondents herein, who are the only heirs at law.

These heirs at law brought suit in the court of common pleas in Charleston, South Carolina, against the appellant and others, to recover the said real estate as in case of intestacy. They had a decree, and, also, that the mortgage on the same be paid by the executor, John W. Rice (the appellant), out of the personal assets of the said decedent.

The appellant, in due course, petitioned the surrogate of this county for a final accounting, and asked for a citation to W. C. Forsythe, of Charleston, S. C., as a claimant against the estate. On the return of this citation, John Harbeson (the assignee of the Forsythe mortgage) appeared and filed his claim. Evidence having been taken thereon by the surrogate, and it appearing that there were no personal assets in South Carolina from which the claim could be paid, and it being conceded that there were sufficient personal assets in the hands of the executor in this State to pay it, the surrogate in the decree on final accounting adjudged that the claim be paid by the said executor out of the personality.

From that part of the decree the appeal was taken.

*Richard O'Gorman* and *George Stevenson*, for appellant. Since the defendant, John Harbeson, brings his mortgage to New York for adjudication, he is governed by the laws of New York. 1 Rev. Stat. 700; Story on Conf. of Laws, §§ 325, 528, 529 (a); *Aspden v. Nixon*, 4 How. 467; *Smith v. Union Bank*, 5 Pet. 452; *Holmes v. Remsen*, 20 Johns. 265 (*dictum*); *McElmoyle v. Cohen*, 13 Pet. 324.

The record of the South Carolina court is not binding here. *McElmoyle v. Cohen*, *supra*. In equity, where one claimant has more than one fund to resort to, and another only one, the first shall first resort to the fund upon which the second has no claim. *Lanoy v. Duke of Athol*, 2 Ark. 406; *Lacane v. Merteirs*, 1 Ves. 312; Story's Eq. Jur., § 633, etc. The words "after my just debts, etc., are paid," does not charge the legacies. Legacies are debts. 2 Redf. on Wills, 868; 1 Story's Eq. Jur. 601 (*note*).

*Malcolm Campbell*, for respondents.

BRADY, J. The first question to be considered in this case grows out of the statute (1 R. S. 749, § 4), which makes the land the primary fund for the payment of the mortgage of the deceased

mortgagor. It is insisted, by the appellant, that it is controlling upon the mortgage creditor, confining his remedy in the first instance to the land and allowing a resort to the personal estate for a deficiency only. In this view we think he is in error. Prior to the statute the personal estate was the primary fund, and the heir could insist upon its application to the payment of the mortgage, thus acquiring the fee without the burden of the mortgage. The heir or devisee might throw the charge on the personal representative. *Cumberland v. Coddington*, 3 Johns. Ch. 229; *Mollan v. Griffiths*, 3 Paige, 402. The statute was passed to prevent this seeming injustice. See revisers' note, 3 R. S. (2d ed.) 600. In *Mollan v. Griffiths*, *supra*, the provision was under consideration, but it was held not applicable in that case, because the rights acquired existed prior to its passage. In *Halsey v. Reed*, 9 Paige, 454, its effect was considered, and although the case would seem to be an authority for the proposition that it controlled the right of the creditor, that is, the mortgagee or his assignee, to resort to the personal estate prior to the exhaustion of the real estate covered by the mortgage, it was not so expressly declared. The Chancellor said: "The note of the revisors to this section of the statute clearly shows that the intention was to make the premises charged with the mortgage the primary fund for the payment of the debt in all cases between the heir and devisee and the personal representative of the testator or intestate, who had assumed the payment of the debt, except where the decedent by his will had made a different provision for such payment." In other words, the object of this section was to abrogate the rule of this court, which, in certain cases, compelled the representatives of the decedent to pay off incumbrances upon his real estate for the benefit of the heir or devisee of such real estate. In *Johnson v. Corbett*, 11 Paige, 265, it was substantially held by the chancellor, that the mortgage creditor could claim from the personal estate only the balance left beyond the value of the real estate upon which the whole debt was a lien, he having in a prior case (*House v. House*, 10 Paige, 158) declared that the statute applied as well to cases of absolute intestacy as where the mortgagor had disposed of the whole or a part of his estate by will. In *Mosely v. Marshall*, 27 Barb. 42, the provision of the statute under consideration, it was said, makes the land subject to a mortgage the primary fund for the satisfaction of the mortgage, and it was declared that the executor was not to be resorted to by

the devisee for the satisfaction of the mortgage, but the case is silent upon the question of the mortgage creditor's rights as to the remedy he may adopt to collect his claim. In *Taylor v. Wendell*, 4 Bradf. 324, the surrogate said: "The provision of the Revised Statutes, that mortgages are not a charge upon the general estate, but the devisee must take the lands *cum onere*, is never disturbed, unless by some clear and express direction in the will;" but the case contains no suggestion as to the mode of enforcing payment. In *Roosevelt v. Carpenter*, 28 Barb. 426, however, decided in this district, it was substantially determined that the statute did not impair the rights of the creditor, who could foreclose the mortgage or sue the heirs. The cases in the 9th and 11th of Paige, *supra*, were held to have no application, and the statute was declared to be a regulation as between the heirs and the personal representatives.

The decision in the last case cited is controlling upon this court, and disposes of the question stated. It is in accordance with the spirit of the statute and the intention of the legislature. The note of the revisers, to which attention has been called, sufficiently demonstrates the object in view when it was passed, which was not to interfere with the rights of the mortgage creditor, but to establish an equitable rule among the heirs and devisees by which none of them, to the detriment of others, could call upon the personal estate to discharge a lien upon land to which they took title, either by inheritance or devise, and this view of the statute is foreshadowed in the opinion of the chancellor in the cases cited, notwithstanding the ultimate construction which he adopted. In the application of that statute in this State, it seems quite clear that if the creditor seeks the personal estate to pay the mortgage, the value of the real estate, to the extent of the mortgage, should be considered in the distribution of the estate between the heirs and devisees, so that the result would effect what the statute was intended to accomplish, if the estate were large enough. In other words, the heirs or devisees holding the land would be charged with its value as part of the share to which they would be entitled. In this view, it would in such cases be of little importance in which mode the creditor might seek the payment of his debt. The land being the primary fund, as between the heirs and devisees, would be treated as a part of the general estate, and made to bear its burden.

The estate herein is not large enough, however, to apply this principle, and it cannot be done therefore. It follows from these views



that the remedy of the respondent is not confined to the land, and that he may resort to the personal property, but it does not necessarily follow from that conclusion that the appeal herein cannot be sustained. There are other principles which come into view. Equity frequently interposes between debtor and creditor where there are two funds, as in this case, out of either of which payment may be enforced, adjusting the remedy to the circumstances disclosed. There is natural justice in the exercise of this power as long as it is so administered that the rights of the creditor are not prejudiced. If, for example, a judgment debtor aliens part of his real estate on which the judgment is a lien, a court of equity, on application therefor, will compel the judgment creditor to exhaust the estate remaining in the debtor's hands before selling the part so aliened. *Clowes v. Dickenson*, 9 Cow. 403. Or it may be done on motion by the court in which the judgment was obtained. "This," said WOODWORTH, J., "is a clear principle established by all the authorities, and approves itself to the plainest suggestions of natural justice."

The power has frequently been exercised by courts of equity, and is, therefore, a familiar rule. It should be applied here, and the respondent compelled to exhaust his remedy against the land before he can resort to the personal property. In this way the intention of the testator as to the distribution of his estate can be carried out, and the principle of the statute discussed applied. The real estate will then, as designed by the legislature, be made the primary fund for the payment of the mortgaged debt. If the sale of it does not produce funds enough to pay the debt, the respondent can then apply for the payment of the balance out of the personal estate. This will protect his rights and do equity. The testator did not intend that the persons succeeding to the real estate should enjoy it exclusively without its burdens.

The existence of a judgment in a court of South Carolina, decreeing the payment of the mortgage out of the personal estate, has no extra territorial force to accomplish the object here. It is in effect a judgment *in rem*, and has no absolute application to any personal property except that within the jurisdiction of the court pronouncing the judgment. Story's Conf. of Laws, § 592. The respondent having applied here for the payment of his mortgage must submit to the laws, which may be invoked either for or against him. It is universally admitted and established that the forms of

remedies and the modes of proceeding and the execution of judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted, or, as the civilians uniformly express it, according to the *lex fori*. Story's Conf. of Laws, § 556. He asks to have personal property applied to the payment of his debt, which is secured by a lien on real estate elsewhere, and we answer him that he must first exhaust that estate. We say that this is in accordance with our settled policy, which, while it does not affect him injuriously, protects the equitable rights of others. We have not been shown that by the laws of South Carolina he may not foreclose his mortgage by reason of the death of the mortgagor, and the laws which govern the estates of deceased persons there — a fact which might affect the question. It is a well-settled rule, as suggested, founded on reason and authority, that the *lex fori* furnishes in all cases, *prima facie*, the rule of decision, and, if either party wishes the benefit of a different rule or law, he must aver and prove it. *Monroe v. Douglas*, 5 N. Y. 447. In the absence of such proof we may assume that the law of that State is like our own on this subject, and that he can proceed to foreclose the mortgage as he might do here.

It must be said, in addition to these views, that the personal property being situate here, is subject to such regulations as our laws may establish in reference to its appropriation. It has a *situs* for that purpose. A nation within whose territory any personal property is actually situated has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there. It may regulate its transfer and subject it to process and execution, and provide for and control the uses and disposition of it to the same extent that it may exert its authority over immovable property. Story's Conf. of Laws, § 550; Wheaton's Conf. of Laws, §§ 605, 606, 809, 838.

The laws of this State in relation to a preference in the payment of debts out of the estate of a decedent, by which a foreign judgment would, against such an estate, rank only as a simple debt, and not entitled to a preference with domestic judgments (*Brown v. Public Administrator*, 2 Bradf. 103), to attachments against non-resident debtors and to insolvency, illustrate this authority to regulate the legal status of personal property and show its exercise.

This case, being considered in these various phases, renders it obligatory upon us, we think, in the application of our rules of law

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Bloss v. Chittenden.

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and principles of equity, to reverse the decree of the surrogate, or to modify it so far as to provide that the respondent shall exhaust the real estate covered by the mortgage, and on the coming in of the proper proof have payment of any deficiency out of the personal estate.

*Ordered accordingly.*

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BLOSS v. CHITTENDEN, administrator, etc.

*Partnership — dissolution — agreements between partners — construction of — final accounting — express promise to pay.*

In 1859, plaintiff and defendant's intestate each owned a bank in Wisconsin; plaintiff the C. bank, and the other the M. bank. They formed a copartnership, each contributing his bank, and together they contributed a bank known as the L. bank, and each contributed some money. The partnership thus formed continued until 1861, when it was dissolved. During the time the three banks continued to do business as such, and had transactions with each other, as though no partnership existed between the owners. At the time of the dissolution the books of the banks showed that the M. bank was indebted to the C. bank \$1,000, and that the L. bank was indebted to it \$3,000. Upon dissolution, plaintiff transferred to his partners all his interest in the M. and L. banks, and his partner transferred to him all interest in the C. bank. The partners agreed in writing that the M. and L. banks should pay plaintiff the \$3,000 due the C. bank, as soon as they conveniently could, with interest at the rate of 12 per cent; and defendant's intestate pledged "his honor to pay the balance" as soon as it could be done without pressing the banks.

In an action upon this agreement *held*, that the indebtedness, if any, was not in favor of plaintiff against the two banks as such, but against the intestate, arising out of partnership transactions; that there was not shown to have been a final accounting between the partners, or an express promise on the part of the intestate to pay, and that plaintiff could not recover.

The rule in this State is well settled, that one partner cannot recover at law against another, except after a final accounting, balance struck, and express promise to pay.

MOTION for a judgment upon a verdict for plaintiff, directed by the court, subject to the opinion of the court at general term. The facts appear in the opinion.

*W. I. Butler*, for plaintiff.

*S. Chittenden*, for defendant.

**BARRETT, J.** This is a motion by the plaintiff for judgment upon a verdict directed at the circuit, subject to the opinion of the court at general term.

The facts are peculiar and must be stated somewhat fully, in view of the double aspect in which it is sought to charge the defendant, to appreciate the conclusions at which we have arrived.

In the year 1859, Bloss, the plaintiff, was a banker doing business at Beaver Dam, in the State of Wisconsin. At the same time, Huntington, the defendant's testator, was also a banker doing business in the same State. Each controlled and indeed claimed the actual ownership of a bank — Bloss, the City Bank of Beaver Dam, and Huntington, the Mercantile Bank of Lodi, while the two claimed the joint ownership of the Laborer's Bank. On the 7th of May, 1869, Bloss and Huntington formed a partnership in the banking business, Bloss contributing "as stock" (so the articles read) the City Bank, Huntington contributing the Mercantile Bank, and the two contributing the Laborers' Bank. Some money was also contributed by each of the parties. These banks were formally incorporated under the banking laws of the State of Wisconsin. That is, a certificate of incorporation was signed and acknowledged. But, although the stockholders are indicated on the face of the certificate, yet no stock was ever in fact issued by either the Mercantile or Laborers' Bank, while all the stock of the City Bank was owned by Bloss. In fact, all the banks were absolutely controlled and managed by and treated as the private property of the persons signing the certificate or their transferees. Thus it was practically the case of individuals putting on a corporate character, to enable them to issue currency for their own private purposes. The partnership of Bloss & Huntington continued until 1861, when it was dissolved by mutual consent. During the existence of the partnership, the banks outwardly preserved their corporate individuality. Separate books were kept by each "institution," and their dealings, as between themselves, were recorded quite as though no partnership had existed. At the time of the dissolution, the Mercantile Bank, as between itself and the City Bank, was nominally indebted to the latter in about the sum of \$1,000. There was also a similar book-keeping indebtedness of about \$2,000 on the part of the Laborers Bank.

Upon the dissolution Bloss transferred to Huntington all his interest in the Mercantile and Laborers' banks, and Huntington

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transferred to Bloss all his interest in the City Bank. An agreement was then executed reciting the fact that Huntington was then the owner of the Mercantile and Laborers' Banks, and that these banks were indebted to Bloss, then owner of the City Bank, in about \$1,000 and \$2,000, respectively, "as it doth appear on the books of said City Bank of Beaver Dam." Following this recital was an agreement upon Bloss' part "to hold" the debts thus admitted until the Mercantile and Laborers' Banks could conveniently pay them, upon condition of the payment of interest at the rate of twelve per cent per annum; and Huntington pledged "his honor to pay the said balance due, as soon as it can possibly be done, without distressing the said banks."

Upon this agreement the plaintiff sues, and, in his complaint, he claims to recover upon two grounds: First. Pleading the partnership, that the admitted indebtedness was the result of a final accounting between Bloss and Huntington, upon which the said balances of \$1,000 and \$2,000 were found to be due to Bloss by Huntington, and were thereupon assumed by the latter. Second. And quite independent of the partnership, that Bloss, by force of the recital in the argument, became a creditor of the two banks to the extent of \$3,000, and that Huntington, as their admitted owner, was liable to him as such creditor. This second position is clearly untenable upon the plaintiff's own showing, for he testified that the indebtedness recited in the agreement "arose out of the partnership transactions." It seems to us that this piece of evidence disposes of all the questions in the case, so elaborately discussed upon the briefs, with respect to the *status* of such banks and the liabilities of the owners thereof, and of the stockholders therein under the laws of Wisconsin. Besides, the banks in question were, to all intents and purposes, mere agencies of Bloss & Huntington, and their transactions were but a part of the partnership business. As a matter of fact, therefore, the debts recited in the agreement were not due from either bank to the other, but were simply incidental balances having no significance at all as between the banks themselves, and none even as between Bloss & Huntington until transferred to the regular partnership books. Thus the Mercantile and Laborer's Banks, as referred to in the agreement, were but other names for Huntington, and the City Bank was but another name for Bloss. It is quite plain, then, that the plaintiff cannot be treated as a creditor of a moneyed corporation seeking redress as against the stockholders or

"owners" of the institution, and that the case must rest, as, indeed, the learned counsel for the plaintiff almost conceded in his oral argument upon the first ground, viz., that the recital in the agreement is an admission by Huntington of indebtedness to Bloss, resulting from the partnership transactions. Upon the trial it was claimed by the defendant that Huntington's pledge of his honor was not a promise on which he could be held, and, further, that if it were, the promise was void for usury by reason of Bloss' covenant to forbear upon condition of the payment of twelve per cent per annum, but ten per cent per annum being the lawful rate of interest in Wisconsin, at that time.

The plaintiff appears to have conceded the latter point, and, to avoid it, withdrew the agreement so far as it contained a promise or pledge of honor, and rested solely upon the recital of indebtedness. Coupling that recital with the oral proof that it had reference to the partnership transactions, he rested. The difficulty here was that he entirely failed to show any full or final accounting, or any balance struck between the partners. There is nothing upon the face of the recital to indicate any such full or final accounting or any final balance struck. On the contrary, it appears to have been but partial, and to have had reference only to such transactions as grew out of the relations of the banks in their dealing with each other.

But apart from that there was no proof of an express promise to pay. The rule in this State is well settled that one partner cannot recover at law against another except after a final accounting, balance struck, and *express promise to pay*. *Casey v. Brush*, 2 Cal. 294; *Westerlo v. Evertson*, 1 Wend. 532; *Halstead v. Schmelze*, 17 Johns. 80.

Nothing of the kind is pretended here. Indeed, the only expression in the agreement tending in the slightest degree to establish such a promise was, as has been shown, withdrawn from the case to avoid the objection that it was tainted with usury.

In every aspect of the case, therefore, the court is of opinion that the defendant is entitled to judgment with costs.

INGRAHAM, P. J., and BRADY, J., concurred.

*Judgment accordingly.*

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Barry v. Mutual Life Insurance Co. of New York.

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**BARRY V. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *et al.*, appellants.**

*Conflict of law — action for same subject-matter before different tribunals — when injunction will not lie.*

While it is a settled principle, that where two tribunals have concurrent jurisdiction, the one which first obtains jurisdiction of the parties and of the subject-matter has the right to determine the controversy, the courts of this State will not stay a defendant, who is a non-resident, from prosecuting his action in the forum of his own residence.

Plaintiff brought action against an insurance company to recover the amount of an insurance upon the life of her husband. Certain residents of Maryland, who claimed an interest in such insurance, and to whom the policies were made payable, were joined as defendants. They appeared and defended. Afterward they brought an action against the insurance company in the United States court in Maryland, to recover the amount due upon the same policies. *Held*, that an injunction would not issue to restrain defendants from prosecuting such last-named action.

APPEAL from an order restraining two of the defendants from prosecuting, in another court, an action involving the same subject-matter as this action.

The complaint was filed, in this action, on the 13th of April, 1872 and sets forth the issuing by the Mutual Life Insurance Company, the defendant, of two policies of insurance upon the life of John S. Barry for the benefit of his wife, the plaintiff. The insured died in March, 1872, and this action is brought to recover the amount of these policies. It is claimed that these policies were assigned by John S. Barry and the plaintiff to Brune, one of the defendants, and that to make the title more perfect, Brune suffered the same to lapse, upon an understanding with the agent of the company that renewed policies were to be issued to Brune for the same amounts; that such policies were issued, and that the dividends accruing upon the policies in favor of plaintiff were applied to the payment of the premiums of the renewed policies, Brune paying the residue of such premiums with money furnished by the deceased Barry for the account of plaintiff. The defendants, Brune and Whitredge, appeared on May 11, 1872, and put in their answer on July 1, 1872. On June 20, 1872, in pursuance of a stipulation signed by the attorneys for all the parties, and an order granted thereupon, the insurance com-

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pany deposited the amount due upon the policies of insurance in the United States Trust Company to the credit of this action. It was stipulated that, upon such deposit, the company should be discharged from all liability to any of the parties in this action, and this action should be discontinued as to said company. On September 9, 1872, Brune and Whitredge commenced actions in law against the company in the United States Circuit Court for the district of Maryland, to recover the amount due upon these two policies, being the sum claimed by Brune and Whitredge in their answers in this action. On November 30, 1872, the order of June 20, 1872, was vacated. An appeal from this order is now pending before the court of appeals. On motion of the Mutual Life Insurance Company, defendant, an order was granted by Mr. Justice DANFORTH at special term, restraining Brune and Whitredge from prosecuting their actions in Maryland, and from commencing any other action upon the policies in any other court. From this order the defendants Brune and Whitredge appeal.

*S. P. Nash*, for appellants, Brune and Whitredge.

*Henry E. Davies*, and *Davis & Work*, for respondents, the company, cited Story's Eq. Jur., § 806; 6 Johns. Ch. 444; 3 Edm. Ch. 71; 2 Ves. & Beames, 412; 2 Mer. 107; 2 Paige, 402; 10 How. 56, 68; 6 McLean, 355; 9 Wheat. 532; High on Injunctions, § 57; 49 Barb. 299; 33 N. H. 470; 3 Abb. Pr. 377.

FANCHER, J. It seems to be a settled principle, that, where two tribunals have concurrent jurisdiction, the one which first obtains jurisdiction of the parties, and of the subject-matter, has the right to determine the controversy, and do justice to all concerned. *Sherry v. Bacon*, 10 How. 58; *Ex parte Robinson*, 6 McLean, 355; *Smith v. McIvers*, 9 Wheat. 532. It is also well settled, that a court of competent jurisdiction of this State has power to enjoin a party to an action pending before it from interpleading an adverse party in a foreign tribunal, relative to the same controversy. *Field v. Holbrook*, 3 Abb. Pr. 377; *Portlantington v. Sounby*, 3 Mylne & Keene, 104; High on Injunctions, 39, 57-60; *Derien v. Foote*, 4 Anen, 545; *Vail v. Knapp*, 49 Barb. 299; *Great Falls, etc. v. Worcester*, 33 N. H. 470. All parties concerned are before the court in this action, and all questions touching the controversy between



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them are raised by the pleadings therein. But a further principle is involved in this case, which is, will the courts of this State stay a defendant, who is a non-resident, from prosecuting his action in the forum of his own residence? If a stay is proper, should not the application for it be made in the forum, where the action is pending? Whenever one party is liable to another, in consequence of contract, trust, or *mala fides*, equity gives to the court jurisdiction wherever the person of the defendant may be found, and this principle has been applied even where the subject of the action was situated in a foreign State. *Massie v. Walls*, 6 Cranch, 148; *De Kryn v. Watkins*, 3 Sand. Ch. 185; *Mitchell v. Brune*, 2 Paige, 616; *Williams v. Fitzhugh*, 37 N. Y. 450. Yet, in the last-named case, WOODRUFF, J., said (p. 451): "It would be a novelty to hold that a plaintiff could not prosecute and maintain his affirmative right in this State, because he was asserting those rights for his protection, in defending a prosecution by his adversary in another jurisdiction." If that sentence correctly states the law, then there is no reason why the appellants, in this action, cannot affirmatively maintain a prosecution in Maryland, where they reside, upon the policies held by them, because they are, for their protection, defending this action in a court of this State. It would be no bar to a prosecution in Maryland, that the appellants brought an action in this State for the same cause. Much less can it be held a bar to an action in Maryland, that the appellants are defending their rights in an action brought here by other parties. It is not in accordance with interjudicial comity, to compel a non-resident defendant, who has been required to yield to the jurisdiction of an alien court, to abstain from resorting to his own tribunals. In *Hammond v. Baker*, 3 Sandf. 704, it was held, that where a plaintiff in an action in this State commenced, afterward, an action for the same cause in a foreign court, he could not be here restrained from prosecuting the latter suit. It was said, the court in the foreign State would control parties before it, so as to prevent wrong and oppression, although the court here might interfere, so far as to compel the plaintiff to suspend his action there or here. Wherever a remedy is sought, it is to be administered according to the *lex fori*, and such relief is given as the laws of the State allow where the action is brought. Story's Conf. of Laws, § 571. In construing contracts, courts are governed by the *lex loci*; but, in respect to remedies, they must be pursued according to the law of the *forum*.

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It may be, that the appellants have remedies in Maryland, in actions upon the policies, which they cannot have in this State, and there does not seem to be any sufficient reason why the court here should deprive them of such remedies, or undertake to restrain them from prosecuting their action in the courts of the State where they reside. If such restraint is proper, the courts there can enforce it. The order appealed from should be reversed, with costs.

BRADY, J., concurred.

*Order reversed.*

PEOPLE *ex rel.* BROWN, appellant, v. GREEN, comptroller, etc.

(No. 1.)

*Construction of statute — laws, 1870, chap. 190 — New York City — mandamus.*

By the provisions of Laws of 1870, chap. 190, all moneys drawn from the treasury of New York, for county expenditures, "shall be upon vouchers examined and allowed by the auditor, and approved by the comptroller." *Held*, that the auditor and comptroller were not authorized to examine and pass upon the claims themselves, but upon the vouchers only. The board of supervisors acts judicially in reference to charges against the county, and its action is final and conclusive. The duty of the auditor and comptroller is limited to a ministerial examination and approval of the vouchers and where a claim has been properly allowed by the board of supervisors the claimant is entitled to mandamus to compel the examination and allowance of his vouchers by the auditor and their approval by the comptroller. *People ex rel. Ellis v. Flagg*, 15 How. 553, criticised and limited.

Such claimant would not, however, previous to such examination, allowance and approval, be entitled to mandamus to compel the comptroller to pay the claim.

THE relator applied to the court for mandamus to compel the respondent to pay certain claims against the county which had been audited and allowed by the board of supervisors. This application was resisted by the respondent, on the ground that the claims had never been audited by the auditor of accounts in the finance department; and on the ground that they were not approved by the comptroller, and were not just and proper claims against the county. The opinion states the necessary facts.

*Brown, Hall & Vanderpoel*, for relator.

*E. Delafield Smith* (counsel to the corporation), for respondent.

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BRADY, J. The case of *People ex rel. Ellis v. Flagg*, 15 How. 553, relied upon by the respondent, does not sufficiently maintain the proposition, that, under the statute of 1870 (chap. 190), the comptroller has a revisory power or concurrent power with the board of supervisors in auditing and allowing claims against the county. It is true that the statute therein considered is identically the same as that of 1870, but that adjudication must be regarded as intended to apply to the facts disclosed only. The claim presented in that case was allowed by the supervisors, and the comptroller directed to pay it. It was never, or as the report of the case states, the bill was never examined or delivered by the auditor of the finance department, and the comptroller refused to draw his warrant as directed. The mandamus applied for was to compel *him to pay*. The act of 1857, considered and applied in that proceeding, provides (Laws 1857, chap. 59, § 6) "that all moneys drawn from the treasury by authority of the board of supervisors shall be upon *vouchers* for the expenditure thereof, examined and allowed by the auditor and approved by the comptroller." The right of the relator to payment depended therefore upon the examination and allowance contemplated, that is, the examination and allowance of the vouchers by the auditor and the approval of the comptroller. The bill; that is, the voucher, had never been examined or allowed by the auditor, and it is clear that the relator was not entitled to the remedy which he sought to obtain. It was his duty to request the examination and allowance of the vouchers presented and the approval of the comptroller thereupon, and if any of the ministerial acts required were not performed, his remedy was to compel its performance by mandamus. The court was, under the circumstances, quite justified in saying, "It is, therefore, too clear to admit of controversy, that, since the act of 1857, an audit and allowance by the board of supervisors is *not sufficient* to authorize the payment of any money out of the treasury;" but the further suggestion, which seems to be that the *claim* must be examined and allowed by the auditor and approved by the comptroller, was neither necessary to the decision of the appeal, nor warranted by the law of the land. The learned justice who delivered the opinion in that case does not say, that *the claim* must be examined and allowed, but says, "to comply with the mandate of this law, in addition to such audits and allowance by the board the same must be examined and allowed by the auditor, and, as a further check and safeguard, be approved of by the comptroller;"

and then proceeds to the judgment of the court, "as in this case there has been no examination and allowance by the auditor nor any approval by the comptroller which," etc., thus indicating, if it be not a positive statement thereto, that the relator must fail, because the prerequisites of examination and allowance by the auditor and approval by the comptroller had not been obtained. This case, therefore, which has been frequently cited as an authority to sustain the proposition that the auditor of the finance department has the right, under the act of 1870, to examine and allow an account, that is to pass upon its validity, notwithstanding its allowance by the board of supervisors appears, upon careful examination of it, to afford little support in that direction. The substance relates to the necessity of an examination and allowance by the auditor and approval by the comptroller, whether of the voucher or the claim does not distinctly appear, and the shadow, if the expression may be allowed, is the supposed declaration of the extended power of the auditor just stated. The right and duty of the auditor to examine the vouchers and to allow them under the act of 1853, chap. 217, § 13, cannot be questioned, and, therefore, Ellis, the relator in the case, *supra*, was not *rectus in curia*, and not entitled to the remedy he attempted to invoke. The distinction between examining and allowing the vouchers, and examining and allowing the claim, does not appear to have commanded the attention of the court in the case commented upon. The assumption seems to have been that the statute related to the demand, and that the authority of the auditor and comptroller was concurrent with that of the board of supervisors, although it is not expressly so said.

The distinction, however, is one which cannot be disregarded. As suggested by Justice SUTHERLAND in *People ex rel. Kelly v. Howe*, 12 Abb. 192, in discussing the effect of the provision of the act of 1853, herein set out, the power to examine, settle and allow accounts is one thing, and the power to examine, allow, and approve vouchers is another thing. The word "voucher" would seem to mean or imply evidence, written or otherwise, of the truth of a fact — that the services had been performed or the expenses paid or incurred; not evidence of a legal or mental conclusion on the question whether the services or expenses, assuming the services or the expenses to have been in fact performed, paid or incurred, are properly county charges, or are properly allowable when the account for them is presented for allowance, or should be allowed to A B or C D." The vouchers to

be presented, examined and allowed by the auditor are the account in proper form verified, the resolution of the board of supervisors allowing it, and the acquittance or discharge to be signed on payment being made. The duty of the auditor is to see to it that the resolution relates to the account and is genuine; that the footing up of all the items, if several there be, is correct; that the account is verified properly, and that all these clerical duties shall have been duly observed to make the voucher a proper acquittance or discharge for the account paid. It was this safeguard that the legislature designed to perfect by the provision referred to, and thus to prevent the payment of an account on the resolution of the board of supervisors only, which might sometime facilitate frauds upon the treasury of the city. If, for example, the account of a claimant was allowed in a general way, one might be presented to the finance department, differing in amount from that passed upon by the board, or not properly certified, or not in compliance with the statute, which requires that the clerk of the board shall designate upon every account upon which any sum shall be audited and allowed, the sum audited and allowed, and the charges for which the same was allowed (see 1 Stat. at Large [Edmonds'], 340, § 12; also, 1 R. S. [5th ed.], 859, § 58), and the examination and allowance of the vouchers, that is, all the prerequisites to payment, would, in all probability, detect the fraud or omission, if the auditor did his duty. The approval of the comptroller is a check upon the auditor, the former, by his examination, being advised of the nature of the vouchers and of the action of the auditor. This view of the question accords with the general duties of the finance department, which are not only to pay the bills presented for settlement, but to see to it that all the clerical tests are applied to ascertain that the amount demanded is correct. In its relation to the board of supervisors this is apparent. That body acts judicially in reference to charges against the county, and its action is final and conclusive. *Supervisors of Chenango v. Bidwell*, 4 Wend. 453; *Supervisors of Onondaga v. Briggs*, 2 Denio, 26, 39; *People v. Supervisors of Schenectady*, 35 Barb. 408; *Huff v. Knapp*, 5 N. Y. 65; *People v. Supervisors of Livingston*, 26 Barb. 118; *People v. Start*, 23 id. 344; *People v. Lawrence*, 6 Hill, 244; *People v. Supervisors*, 9 Wend. 508; 2 Crarys Spec. Proc. 58 (3d ed.), and cases cited.

In this county its judgment does not, however, as we have seen, entitle the creditor to payment. He must submit his vouchers for

examination, allowance and approval. Act of 1870, *supra*. The board determines the existence of the indebtedness, and the finance department must see to it that proper vouchers are presented, examined and allowed. The two things are in harmony and entirely consistent with each other, one relating to the examination and allowance of the claim, and the other to its payment upon the proper vouchers. It was not intended that the auditor should sit in judgment upon the demand, and subject his decision to the approval of the comptroller. This would be, in effect, creating an appellate tribunal, composed of the auditor as the chief acting officer, and the comptroller as supervisory. Whether the proceedings on the part of the board of supervisors are the subject of review, if fraudulent, or from any cause illegal, is not the question now before us. It is not for us to say either, on this appeal, whether the mandamus should be refused as a matter of discretion. There is nothing on the record to justify us in holding either that the claim is unjust, or that the supervisors acted improperly in allowing it. The examination of its validity by the auditor is not a judicial proceeding. He had not the power to make it, and his conclusions, differing though they do from those of the supervisors, are not *per se* evidence of fraud or unfairness. They are nothing more than those of any citizen who should devote himself to the subject. They cannot intervene to defeat the judgment of a competent tribunal. The result of these views is, that the audit and allowance of the board of supervisors is conclusive of the right of the relator to recover his claim, subject only to the examination and allowance of his vouchers by the auditor, and the approval of the comptroller thereupon, and to the power of the court to intervene by due process in case of fraud or collusion shown. These conclusions are sustained by Mr. Justice SUTHERLAND in *People ex rel. Kelly v. Howe*, *supra*, and in the recent cases of *People ex rel. Haskell v. Green*, decided by Judge J. F. DALY in the common pleas; *People ex rel. Patrick Martin v. Earle & Green*, decided by Justice FANCHER at a special term of this court.

Notwithstanding these views and results, however, the relator must fail on this appeal. His application was for a mandamus to compel the comptroller to pay the demand allowed, and not to compel the auditor to examine and allow the vouchers and the comptroller to approve. The application hereto has not been made. The auditor has proceeded to examine and allow the claim as he

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deemed best, but that is, as we have seen, not what he is to do. He has not examined or allowed the vouchers. The relator is not in a condition, therefore, to enforce payment until the statute is complied with, and he was not entitled to the relief demanded. He seems to have acted on the assumption that the credit and allowance of the board of supervisors were sufficient. In this he was in error. His course was to procure an examination and allowance of his vouchers, which, if refused, might be compelled in due process of law. The order appealed from must, for the reasons assigned, be affirmed.

INGRAHAM, P. J., concurred.

*Order affirmed.*

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PEOPLE *ex rel.* BROWN, appellant, v. GREEN, comptroller, etc.

(No. 2.)

*Counties — charges against — stationery furnished to sheriff — void audit.*

The relator supplied to the sheriff of New York county note, foolscap and letter paper, envelopes and writing and blotting materials. *Held*, that the articles could not be allowed as a charge against the county. There is no statute authorizing the furnishing of such things, and they do not come within the rule that, wherever services have been rendered which are beneficial to a county, and no specific compensation is provided for the same by law, they shall be deemed contingent charges against the county.

*Held*, also, that the charges, not being good against the county, an audit and allowance of them, by the board of supervisors, would be void.

THIS action is of the same nature as No. 1 of the same title. In this case the claims against the county sought to be enforced were for stationery supplied to the sheriff of the city and county of New York.

*Brown, Hall & Vanderpoel*, for relator.

*E. Delafield Smith*, for respondent.

BRADY, J. The result arrived at in case No. 1 applies here. If the relator be entitled to payment for the merchandise supplied, he

must have his vouchers examined and allowed by the auditor, and the approval of the comptroller, under the provisions of the act of the legislature, passed 1870, chapter 190, Laws of that year. The auditor has not been called upon to perform that duty, and is not a party to this proceeding. The comptroller is not to act until the auditor has performed his duty. There is another reason why the mandamus should not be allowed. The articles supplied to the sheriff are not properly chargeable to the county. They consist of note, foolscap and letter paper, envelopes and writing and blotting materials. There is no statute authorizing the furnishing of these things, and they do not pass to the sheriff's successor. They are doubtless indispensable to the proper discharge of the duties of the office, and might justly be declared a charge upon the county by legislative enactment, but they have not been. The sheriff's fees were probably considered sufficient to meet all the incidental expenses of this nature that might occur in his office. He is required to deliver to his successor process and documents in his custody appertaining to his office. Crocker on Sheriffs, § 8. And, it may be, books and papers of the same character, under the provisions of the Code, sections 437, 438, where the proceeding to which they refer is adopted, but that is doubtful. The books and records kept by him would seem to be private property. It is true that this court has held, in several cases, that wherever services have been rendered which are beneficial to a county, and no specific compensation is provided for the same by law, they shall be deemed contingent charges against the county. *Bright v. Supervisors of Chenango*, 18 Johns. 242; *Mallory v. Supervisors of Cortland*; *Doubleday v. Supervisors of Broome*, 2 Cow. 583; *People v. Supervisors of Albany*, 12 Wend. 257; see, also, *Brady v. Supervisors of New York*, 2 Sandf. 460. But the claim which the relator urges is not within the class protected by these decisions. It seems to be clear that he cannot recover this demand. If the charges are not good against the county, the audit and allowance is void. *People ex rel. Kelly v. Haws*, 21 How. Pr. 117. The order should be affirmed.

INGRAHAM, P. J., concurred.

*Order affirmed.*



PLATT *et al.*, executors, etc., v. PLATT.

*Partnership—transactions between partners—undue influence—void transfers—collusive foreclosure—laches—review of equitable proceedings.*

Defendant and a younger brother were copartners in business, carrying on two extensive establishments. The brother, in consequence of unfortunate private transactions and ill health, became mentally enfeebled. While in that condition, at the earnest solicitation of defendant, the brother consented to the transfer of his interest in one of the establishments upon the books of the firm to the defendant and ordered it to be done. At about the same time, he conveyed to the defendant by deed all his interest in real estate, of considerable value, owned by the firm. About nine months afterward, the brother being sick at home, defendant caused to be made out an erroneous balance sheet, wherein, by means of false and improper entries, the interest of the brother in the firm property was made to appear very small in amount, although, at the time, the real amount or value of his interest was very large. The defendant at the time expressed a determination to wipe out his brother's interest altogether. The brother took no part in making out this balance sheet, and did not consent to the methods employed in making it, but was induced by defendant to transfer, in consideration of the amount of his apparent interest upon such balance sheet, his interest in the second establishment. On the same day he conveyed by voluntary deeds valuable lands owned by him in Cayuga and Wayne counties, and three days thereafter, by voluntary deed, valuable real estate in New York owned by him, and constituting the remainder of his property. This last conveyance was proved to have been made in consequence of threats and promises of defendant at the time. While these transfers were being negotiated, defendant held out to the near relatives and friends of his brother that it was necessary to do what was being done in order to prevent the brother's property being seized to satisfy his individual liabilities, and to avoid embarrassment to the firm business, but there was no evidence that the brother transferred his property to avoid payment of his debts, and he had no reason so to do. At the time of the transfer of the first establishment, the knowledge of the condition of the business of the same was exclusively with defendant, and the brother never knew how it stood, and in this action defendant declined to produce such account books as were kept in connection with it.

In an action by the executors of the brother to set aside the transfers of the property, on the ground of fraud and undue influence, *held*, that the burden of proof was with the defendant to show that the transfers first made were the result of investigation, and that the consideration was fair and adequate, or, at least, arrived at after the brother had the same light that defendant possessed.

Equity will scrutinize agreements between partners closely and watchfully, and will not permit them to stand if it can discover that they were brought about by concealment, unfairness, or other unconscionable conduct.

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*Held*, also, that the relation of blood and that of trust growing out of the partnership indicated, when taken in connection with the brother's feeble state, the existence of dominion and influence, and called for proof of the purity of the transactions. Plaintiffs established affirmatively the existence of undue influence, which not being controverted by defendant, the transfers should be set aside.

Certain mortgages upon the real estate were foreclosed at the instigation of the defendant, who purchased at the foreclosure sales. *Held*, that he acquired no better title thereby.

The plaintiffs waited some years after they were entitled to bring the action before commencing it. *Held*, that they were not guilty of laches, the statute not having run and no estoppel or acquiescence being shown.

In equity actions the court will always look at the entire case, and see whether substantial justice has been done, and where that appears, it will affirm the judgment, notwithstanding the admission of testimony which, in ordinary actions at law, might have necessitated a new trial.

THIS is a motion by the defendant, for a new trial, under section 268 of the Code, and to set aside the decision of Mr. Justice FANCHER, at special term.\*

The facts are sufficiently stated in the opinion.

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\*The following is the opinion delivered at special term :

FANCHER, J.: The questions in this action deserve and have received careful consideration. They are important, and involve grave consequences. I have considered the testimony in the case, and the arguments of counsel, and I have examined the numerous authorities cited in the very exhaustive briefs on both sides.

The time at my command will permit me to state concisely only the leading facts of the case, the principles which I consider applicable to it, and the conclusions at which I have arrived.

The right of the plaintiffs to maintain such a suit as the present has not been denied. They are not only the executors of Nathan C. Platt, and, therefore, the proper parties to prosecute for an accounting of the affairs of the partnership, if there are equitable grounds of such relief, but they also take in fee, under the will of Nathan C. Platt, all his real estate. Section 113 of the Code authorizes executors to sue without joining with them the persons for whose benefit the action is prosecuted. As executors, the plaintiffs have an interest to reach all the property of the testator, real and personal, especially to enable them to pay the debts of the deceased.

Perhaps, therefore, it is hardly necessary to cite the statute of 1858 (Laws 1858, ch. 314), to sustain the action, although the provisions of that act are probably broad enough to enable executors to bring such an action, even when the testator has not made them devisees of his real estate. See, also, *Bryant v. Bryant*, 2 Rob. 612; *Babcock v. Booth*, 2 Hill, 181.

The defendant and his deceased brother, Nathan C. Platt, were partners for nearly thirty years. They were engaged in smelting and refining precious metals, and also in selling jewelry, plated ware and watches. Besides their stock in trade, accounts and receivables, they owned jointly, in 1860, two valuable parcels of real estate, in Maiden lane and Liberty place, in the city of New York, where their business was carried on; some lands in Cayuga county, which seem to have been purchased as a speculation; and one hundred shares of the stock of the Artisans' Bank. Nathan C. Platt was also the owner, individually, of some other lands in Cayuga and Wayne counties, and of a large and valuable piece of real estate, consisting of two lots on Nassau street, in the

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*Stephen P. Nash, and Hutchins & Clinch*, for appellants. Oral evidence, that the transfers were in trust, should not have been admitted. 44 N.Y. 156; 20 id. 39; 1 Johns. Ch. 339; 6 Barb. 98.

city of New York. In 1856, Nathan C. Platt became the president of the Artisans' Bank. In 1860 the bank became embarrassed, and Nathan C. Platt's own affairs then became complicated by his connection, as city chamberlain, with the money of the city of New York, deposited in the bank. The deposits were removed, and the bank failed. The evidence shows that these difficulties had a serious and depressing effect upon him, and that he was never afterward the man he had been before. His courage was broken, his spirit was mortified, his power of will was enfeebled, and his energy and mental capacity were weakened. At the same time claims were made against him, and prosecutions were commenced, or threatened, for liabilities in which he had become involved through his transactions with the bank. These occurrences, undoubtedly, greatly contributed to disturb and alarm him. The defendant also appears to have been excited and alarmed. It is not denied that the defendant about this time determined and openly expressed his determination to sever his connection with his brother. He took steps to get rid of him as a partner, and to secure or retain the business, and continue it himself. On the 18th of October, 1860, one large and important, and, perhaps, the most profitable portion of their business—the refining and smelting department—was transferred to the defendant by entries on the partnership books. It was charged to him at the value at which the stock and property employed in that department of the business, appeared on the books kept in the Maiden lane premises. There is no evidence or appearance of any negotiation or hesitation about this transfer. There was no inventory taken, nor any investigation of real values made. There was nothing allowed for the good will of the business. On the other hand, there was no attempt, as was the case in the subsequent transfer of the other department of the business, to reduce or depreciate the value of the property or the interest of Nathan C. Platt. Two days after this transaction, or after the entry upon the books concerning it, Nathan C. Platt conveyed to the defendant his half of the real estate in Maiden lane and Liberty Court, which the partnership owned and occupied. The consideration named in the deeds was the price these properties had cost many years before. I am satisfied, upon the evidence, that both of these parcels were then worth much more. The consideration thus named, although not so grossly inadequate that a court of equity would be required to set the deeds aside for that cause alone, was yet so inadequate as to confirm the account of these transactions given by the plaintiff's witnesses, and to convince me that they were not fair and ordinary bargains and sales, such as would take place between parties dealing with each other on fair terms, upon the footing of real values, nor such as should be allowed between parties who stood to each other in relations of confidence or partnership.

In February, 1861, as was the usage of these partners, an inventory of their stock in trade was taken. This was after the execution of the conveyances to which I have just referred, and after the smelting business which had been conducted at Liberty Court had been relinquished by Nathan C. Platt, according to the entries made on the partnership books. Nathan C. Platt's share of the partnership assets, however, still appeared to be worth nearly \$180,000. There was considerable discussion, and some evidence at the trial, as to the manner in which the goods in the store were estimated in the inventory of February, 1861. I think the evidence shows that they were put down fairly at what was believed to be their value, and that the weight of evidence is, that the inventory represented at that time the value of the goods with reasonable correctness. There is an entry in the balance sheet of February, 1861, which seems to indicate that Nathan C. Platt's interest in the business had been or was to be terminated. I refer to the fact that the merchandise was entered under the title of "new concern." No transfer, however, had been made, nor any changes or credits to accomplish any such termination at the time of the making of that inventory. After this time two balance-sheets or statements of business affairs were made, which have been produced, both dated 23d day of May, 1861. Nathan C. Platt had by this time become so ill and

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*Allegans suam turpitudinem non est audiendus.* 4 Hill, 424; 1 Wall. 58. The dealings for the purchase and sale of the entire partnership assets between the partners, when a dissolution was

enfeebled that he was confined nearly, if not quite, all the time to his house, and was substantially disabled from attending to business. It appears that both of these balance-sheets were made under the direction of the defendant. By the first of these Exhibits, Nathan C. Platt still appeared to have an interest, valued at upwards of \$80,000. The witnesses for the plaintiffs, including not only the plaintiffs themselves, but the book-keeper, Mayhew, who seems to be entirely removed from influence as well as interest, testify that the second account of May 23d, 1861, was made up under the supervision of the defendant, and because of his dissatisfaction with the result exhibited by the first statement of that date. I am compelled to credit the statements of these witnesses, that the defendant entertained and acted upon a purpose to reduce the value of his brother's interest, as exhibited on this balance-sheet, to little or nothing. These witnesses are corroborated by the surrounding facts, and by all the history of the transaction.

The conduct of Nathan C. Platt is inexplicable, except upon the theory that he was controlled by the defendant. The preparations of these accounts successively, the charges made in the partnership books against Nathan C. Platt, and the reduction of apparent values by sweeping deductions, were all dictated by the defendant, even if consented to by his brother. The purpose of all this cannot be mistaken; and it is expressly described in the language which the witnesses say the defendant used. It was "to wipe out" the interest of the enfeebled partner. The assent of that partner to this course, and to the transfer which he was asked to make, was procured by the overmastering influence of the defendant, and by hopes and expectations which he led his brother to cherish of protection and restitution.

Nathan C. Platt's interest was reduced upon the second of these balance-sheets of May 23, 1861, to a nominal amount, and that exhibit was produced to him, signed by his brother, before his own signature to it was obtained.

Without referring further to the particular testimony on the subject, it is plain that this statement was made for the purpose of showing to Nathan C. Platt himself, or to other parties, and perhaps to both, that his interest in the partnership property was worth nothing. Nathan C. Platt was either induced to believe that his interest was of trifling value, or he was persuaded that it was necessary for the interest of himself and his family, as well as of his brother, that his share of the firm property should be placed out of his hands. He was thus induced to consent to the dissolution of the partnership and to the execution of a paper releasing and relinquishing to the defendant all his interest in the partnership business and property, and also to make conveyances to the defendant of all the property which he owned, either as an individual or a copartner. I do not perceive any evidence that Nathan C. Platt was really so far seriously embarrassed, or, at least, that his obligations amounted to so large a sum, that, if his property could have realized its value, it would not have left him a large surplus. Nor do I discover evidence, that left to himself, he wished to avoid the payment of his debts. If any such purpose entered into his mind, or formed the motive for any of these conveyances, I am satisfied it was impressed upon him by the peremptory actions and declarations of the defendant. The relations between these parties were such, that the defendant was bound to the utmost good faith, and to abstain from exerting an influence to control the will of his brother; he was bound also to allow him the benefit of independent professional advice, and of all the knowledge which he himself possessed. I think these accounts which were exhibited were made with a purpose, and were, in fact, untruthful; and it is perhaps not too much to say that, under the circumstances, they were fraudulent. Nathan C. Platt's interest in the partnership assets was apparently extinguished by the introduction or the use made of a "suspense account" of \$124,000. This was done also by putting down the merchandise, after it had been inventoried at its value, at a discount arbitrarily made of twenty-five per cent upon that value, and the transfer of the goods at a depreciated

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agreed upon, was proper. 53 Barb. 285; 45 N. Y. 71; Lind. 791-796; 9 Grattan, 204; 13 Ill. 298; 3 S. & G. 410; 11 Ben. 322; 2 M. & G. 10; 56 Barb. 84; 45 N. Y. 71. Plaintiffs were guilty of laches. 37

rate to the defendant, and by charging Nathan C. Platt with various amounts for which he was not legally liable, and which, so far as appears, he had never agreed to assume. The question of these values is not to be treated as upon an absolute sale to a stranger, or for a consideration actually paid in money. It was a transaction between partners, one of whom was sick and disabled and the other well and active; between brothers, one of whom was in health, and who possessed naturally no inconsiderable degree of influence and control over his junior brother, and the other of whom was disabled by sickness, and prostrated by adverse circumstances. The good-will of the business went with the goods, and all at large deductions from their real value. These transfers were accompanied or followed by conveyances of real estate, owned by Nathan C. Platt, in Nassau street and in Cayuga and Wayne counties, which, it is admitted, were entirely voluntary, without consideration, and, so far as it appears, without motive, unless we can discern the motive in the history of the whole transaction. In all this it does not appear that Nathan C. Platt had any independent legal advice, while it does appear that he was reluctant to execute the final instrument, which should place him entirely in the hands of the defendant, and terminate his interest in the partnership.

If the account which is given by the witnesses for the plaintiffs be true, and it is strongly corroborated by the surrounding features of the case, this final transfer was not obtained without the direct exertion of the defendant's influence over his brother. The law looks upon parties who occupy such relations as these men sustained to each other, as bound to a degree of good faith and fair dealing, which is stricter and more conscientious than that which is regarded as within the limits of supposed proper dealing in the world of trade. The standard is higher than the common morality of trade. *Blisset v. Dantel*, 10 Hare, 536; *Lindley on Part. 492*, book 3d, chap. 2d, 792-3, book 3d, chap. 10, § 3; *Collyer on Part. 99*, § 178; *Maddeford v. Austwick*, 1 Sim. 80; *Lees v. Laforest*, 14 Beav. 250; *Perens v. Johnson*, 3 Sm. Giff. 419; *Clements v. Hall*, 2 De G. & J. 173.

A party insisting upon the validity of conveyances and transfers, which were executed by a sick and enfeebled man, for no consideration, or for considerations below the real value of the property, should be ready to show satisfactorily why they were executed, and to make it appear that no undue influence was exerted on the one side, and no submission to improper persuasion or promises was yielded to on the other; and where the party benefited by such transfers stands in such relation to the grantor, that undue influence may have been exerted, and no proof is offered to rebut its existence, it may be presumed. *Hall v. Hall*, 1 P. & D. 481; *Rhodes v. Bate*, L. R., 1 Ch. App. 257; *Dent v. Bennett*, 4 M. & Cr. 273; *Page v. Horne*, 11 Beav. 227; *Harvey v. Mount*, 8 id. 439; *Brooke v. Berry*, 2 Gill. (Md.) 88; *Lyon v. Home*, L. R., 6 Eq. Cas. 655.

Such transactions have frequently been condemned by courts of equity. *Huguenin v. Basely*, 14 Ves. 273; *Clarke v. Malpas*, 31 Beav. 80; *Grosvenor v. Sherratt*, 28 id. 659; *Lyon v. Home*, L. R., 6 Eq. Cas. 655; *Page v. Horne*, 11 Beav. 227; *Harvey v. Mount*, 8 id. 439; *Sears v. Shafer*, 1 Barb. 406; 6 N. Y. 272; *Voorhees v. Voorhees*, 39 id. 465; *Brice v. Brice*, 5 Barb. 538; *Tyler v. Gardiner*, 35 N. Y. 592; *Whelan v. Whelan*, 3 Cow. 537; *Kinne v. Johnson*, 60 Barb. 69; *Carpenter v. Danforth*, 52 id. 581; *Williams v. Bayley*, L. R., 1 H. L. App. 200; *Boysse v. Rosborough*, 6 H. L. C. 2, 49; *Osborne v. Williams*, 18 Ves. 379; *Eadie v. Stimson*, 26 N. Y. 9.

Upon the promise of the defendant to restore the property, after the emergency was past, both parties were in *delicto*, but not in *part delicto*, and the defendant could not retain property obtained upon such a promise. *Long v. Long*, 9 Md. 348; *Ford v. Harrington*, 16 N. Y. 285; *Davies v. Otty*, 35 Beav. 208; *Blisset v. Dantel*, 10 Hare, 536; *Maddeford v. Austwick*, 1 Sim. 80.

Even a stranger could not take such deeds and transfers, unless the good faith and

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N. Y. 155; L. R., 1 Ch. 616; L. R., 7 Eq. 154; 8 D. G. M. & G. 787; 50 Barb. 258; 2 Cow. 139; 4 Keyes, 469; 1 Curt. C. Ct. 206; 49 N. Y. 10.

honesty of the transaction appeared, and it would be essential to be shown that the donor knew what he was doing; that his acts were free and uninfluenced, and that he was protected by independent, disinterested advice. This is the equity rule, independent of considerations of fraud, especially where the relations of the parties are intimate and confidential. Under such circumstances, a party taking such transfers, and insisting upon the retention of the benefits they confer, must justify them.

The iniquity of them may be inferred from the circumstances, without direct proof of fraud. *Phillips v. Mullings*, L. R., 7 Ch. App. 246; *Hall v. Hall*, L. R., 14 Eq. Cas. 865; *Everett v. Everett*, L. R., 10 id. 406; *Wollaston v. Tribe*, L. R., 9 id. 44; *Coutts v. Acworth*, L. R., 8 id. 558; *Cooke v. Lamotte*, 11 Eng. L. & Eq. 26; *Hoghton v. Hoghton*, id. 184.

I think the evidence shows that the property in Nassau street was, at the time of its transfer to the defendant, worth much more than the incumbrances upon it. It is contended by the defendant, that his title to this and the Cayuga and Wayne counties property is protected by foreclosures of the mortgages which subsequently took place. But I do not see that these foreclosures can avail him for any such purpose. They seem to have been, all of them, suggested, if not procured, by the defendant himself, for the purpose of giving such additional strength as the title derived under them might furnish. But, in addition to this, they, after all, do not place the defendant in any different position or relation than he occupied before the foreclosure took place. He is not a *bona fide* purchaser, without notice of the claims of the plaintiff or of the defects in the title, but simply has acquired the incumbrances, and has the right, perhaps, to stand in the place of the mortgagees, holding liens upon the property until the mortgages are paid. Beyond this, he only holds for what it is worth, the legal title which he derived from his brother.

There cannot be a doubt that the utmost good faith was due from this defendant toward his enfeebled brother. In no relation is such good faith more necessary than between partners, and at no time more absolutely than when one is retiring at the urgency of, and upon the faith of representations made by the other. "*Ad cuius igitur fidem confugiet*," said Cicero in his Roscian oration; "*cum per ejus fidem laeditur cui se commiserit*." It is a case, too, where, from the relation between the parties, the existence of domination and influence will be implied. The law does not limit itself by any arbitrary classification of such cases. Whenever the facts show a relation of blood, business, or intimacy, which confers power on the one hand and imposes submission on the other, the stronger cannot deal with the weaker, without proving the righteousness of his acts. *Dent v. Bennett*, 4 Myl. & C. 273; *Hunter v. Atkins*, 3 Myl. & K. 113; *Harvey v. Mount*, 3 Beav. 439; *Lyon v. Home*, L. R., 6 Eq. Ca. 655; *Sears v. Shafer*, 1 Barb. 412.

The defendant has failed to justify his part in these transactions. But the case is not left here, for the plaintiffs have made out that the transfer and conveyances to the defendant were procured by the exercise of an influence which Nathan C. Platt could not at the time resist; and they were based upon representations, and upon promises of future advantage to the falling man and his family, which were untrue, and in the view of equity, fraudulent.

It is argued that the plaintiffs and their testator have been guilty of laches and delay which is fatal to their case. But it is not shown that the defendant has done or omitted anything by reason of the delay, or that he is in any different position in consequence of it. He has simply enjoyed the fruits of his wrongful acts for several years. If he is called to account and to restore this property, he will be left where he was, and will lose nothing but the fruit of an unrighteous gain. He will lose nothing but the excessive profits gained out of his brother's property, in a way in which he ought not to have made them. I cannot agree to a doctrine which will close the gates of justice to a party who has been injured, before the time when the law bars his entrance, when there is nothing but delay shown, and when neither acquiescence nor injury from the

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*James Emott, Charles Tracy and William Martin*, for respondents. The burden of proof is upon the party taking such transfers. 6 L. R. Eq. 655; 14 id. 365; 4 id. 30; 7 L. R. Ch. App. 244; 11 Eng L. & Eq. 26; 14 id. 134; 8 L. R. Eq. Ca. 558; 9 id. 44. The relation of partnership bound the defendant to the most entire and abundant good faith. 10 Hare, 493, 536; 2 Lindley on Partnership, 943; Finch, 431; 1 Sim. 89; Taml. 45; Collyer on Partnerships, § 178; 14 Beav. 250; 2 De Gex & J. 186; 3 S. & G. 419. The undue influence is sufficiently proved. *Hall v. Hall*, 1 L. R. Pro. & D. 481. Defendant must show that his brother fully understood the nature and consequence of his acts, and made the transfers freely and without pressure, influence or domination of defendant; that he placed his brother in possession of every fact known to him; that his brother had independent professional advice, and that the full and fair value of the property was paid to him by defendant. 1 Barb. 408; 2 Seld. 272; 5 Barb. 533; 35 N. Y. 592; 34 id. 167; 3 Cow. 538; 1 Sto. Eq. Juris., ch. 6, § 238; 14 Ves. 203; 2 White & Tudor's L. C. in Eq. 504 and notes; 31 Leav. 80; 4 Myl. & C. 269; 3 Myl. & K. 145; 11 Beav. 227; 8 id. 439; 28 id. 659; 2 Gill. (Md.) 83; 1 L. R. Ch. App. 252; 6 L. R. Eq. Ca. 655; 58 Barb. 643. If both parties were *in delicto*, they were not *in pari delicto*, 16 N. Y. 285; 35 Beav. 209; 9 Mar. L. 348; id. 461. The deeds were obtained by using the fears of the brother and imposing on his enfeebled state of mind and body, and should be canceled. 1 L. R. H. L. App. 200; 6 H. L. C. (Clark) 249; 180 Ves. 378; 26 N. Y. 9. The foreclosures were

lapse of time is shown. If delay has misled the assailed party and worked him positive wrong; if it has led to such a change of the position of property or persons, that it would be a plain wrong to interfere, or if it has been such, and accompanied by such acts, as to indicate distinct acquiescence, the court may hold the party estopped. But until it comes to that, the only limit is the limit of the statute.

There must be a judgment, declaring the release and conveyance by Nathan C. Platt to the defendant of his interest in the partnership property, executed July 2d, 1861; the conveyance of the property in Malden lane and in Liberty place, and of the Cayuga county lands, null and void; also declaring the deeds of Nathan C. Platt's individual property in Cayuga and Wayne counties, and of his property in Nassau street, New York, void.

The partnership is to be considered as dissolved, from the 23d day of May, 1861, and an account must be taken of the interest of these parties, as of that time. The defendant must be allowed all payments made by him upon the real estate, in good faith, for repairs, improvements, taxes, insurance and payment of incumbrances. He will be charged with the rents and profits which he has received.

A reference is ordered to state these accounts, and upon the coming in of the referee's report, final judgment for the plaintiff, with costs, will be granted.

Findings and an interlocutory judgment can be submitted by the plaintiffs' attorney, upon four days' notice. If the parties do not agree upon the referee, the appointment will then be made by the court.

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collusive and do not alter the position. 2 White & Tudor's L. C. in Eq. 544; 15 Sim. 437; 15 Beav. 551; 10 Hare, 261. There has been no laches by plaintiffs. 1 Sug. on Ven. 387 (8th Am. ed.), note; 20 Johns. 38; 6 Madd. 26; 2 Mac. & Gor. 146; 2 Kay & J. 1; 2 Sch. & Lef. 632; 1 De Gex & J. 78; 49 N. Y. 326; id. 336; 2 M. & K. 674.

BARRETT, J. This is a motion for a new trial under § 268 of the Code, as lately amended. It brings up before final judgment the question, whether the findings of the special term were justified by the evidence, and necessarily involves the consideration of the whole case, both upon the facts and the law.

The suit was brought by the executors of Nathan C. Platt, to set aside certain transfers of property, made by him, in the years 1860 and 1861, to his brother, the defendant.

These executors are the children of Nathan C. Platt, and they charge that the transfers were procured by fraud and misrepresentation upon the part of the defendant, and by means of undue influence, which they assert that he exercised upon their father.

These charges are denied by the defendant, and upon the issues thus raised, there was a trial at the special term that resulted in the decision and judgment in favor of the plaintiffs, which is now under review.

The intimacy between these brothers was close and life-long. Prior to the transfers in question, they had been partners in business some thirty years, the defendant being the head of the house, and nine years the senior. Both were active, energetic and industrious. There were two separate departments in the business; one was importing and dealing in watches, etc., which was carried on at No. 20, Maiden lane, under the superintendence of Nathan, and the other was a gold and silver refinery, established at Nos. 4 and 6, Liberty place, and conducted principally by the defendant. Nathan's sons assisted him in the mercantile business, while the defendant's sons and son-in-law occupied themselves with the refinery.

There being, as was quite natural, perfect confidence between the brothers, neither troubled himself to become acquainted with the details of the department conducted by the other. Matters thus seem to have gone on smoothly and prosperously until, in what was certainly for Nathan an evil hour, he launched into enterprises outside of the regular business of the firm.

He became president of the Artisans' Bank and city chamberlain.



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With rare assiduity he fulfilled the various public and private duties thus assumed, including morning and evening visits to the mercantile establishment, until the latter part of the year 1860, when disasters set in; he then ceased to be chamberlain, the public funds were removed from the Artisans' Bank, and the failure of that institution speedily followed.

During the preceding summer he had been unwell, and had lost much of his old vigor and robustness, while later, in the struggle to sustain his bank, he passed through much excitement and trouble, suffering the anxiety and undergoing the mental wear and tear incident to such a crisis. It was to the intensity of this strain that he himself attributed the disease with which he was attacked at a later period, and he declared to one of the witnesses that "one night during the troubles, he had walked the floor of the Artisans' Bank all night," and that his efforts to make good his city account "had killed him, and broken him down." He bore up, however, until these troubles culminated in the final catastrophe, and then he sank, it is not too much to say, helplessly and hopelessly, declining slowly but steadily both in mind and body, until July, 1863, when he died. The testimony upon this head is full and abundant. It is true that after his illness began he occasionally visited the mercantile establishment, gave a few orders, wrote letters, signed checks, and even transacted some private business; he was never, in fact, *non compos mentis*, within the legal signification of that term, as applied to testamentary disposition. But it is equally true that his mind became so weak as to render him an easy victim to any designing man, and that his credulity, as evidenced by his own diary, was amazing; he was in just that dangerous condition of mind for which the law makes no provision, because the individual is yet within the confines of its definition of sanity; but which equity guards with her just and benignant rules. In this very diary, for instance, he narrates events indicating a perfect child-like faith in the most improbable and transparent and improbable statements of one Plin White, and yet he pens them with an accuracy and precision, carried into the minutest details, worthy not only of the most careful and prudent business man, but of one gifted with a memory sufficiently retentive almost to photograph the scenes depicted.

It is quite evident that the failure of the bank preyed upon his mind, broke him down physically, mortified his pride, crushed his spirit, and superinduced the fatal disease under which he finally

succumbed. The witnesses draw a sad picture of his declining days. In the spring of 1861, he took to his room, and never again left the house. Speaking of his physical condition, they say that he "steadily grew worse," that he was "weak," "exceedingly nervous," "constantly fading away," "suffered a great deal from sleeplessness," and also from pains in his feet, so much so that he could not bear a stocking or sheet to touch him," and that his physicians termed his disease "diabetes," which afterward ran into consumption; the latter finally "carrying him off."

With reference to his mental state, they say that his disposition became "very changeable;" that much of the time he was under "great mental excitement," sometimes "brooding," sometimes "weeping," over his troubles; that he would very frequently "go around the room crying," and "seemed at times as if he did not know what to do with himself," again he would be "almost in a stupor," then "vacillating," "fretful," "despondent," "melancholy," some days cheerful and hopeful of again returning to business, then despairing and perfectly hopeless. They further prove that he had "all sorts of whims and queer ideas;" that he showed one of his sons an advertisement in a newspaper, saying, "perhaps I can make one thousand dollars by investing ten dollars, I wish you would go and see about it," and although his son has promised to do so, never again recurred to the subject; that he asked another of his sons to get him opium to make him forget his troubles, and when it was procured, permitted the package to remain undisturbed; "very soon he forgot all about it;" that he had his old papers and accounts, books and letters brought to him, and that he used to have them on his desk, on his bed, and "strewn all around the floor," spending days looking over them, "apparently with no object at all;" "he seemed," says one of the witnesses, "to have a great hobby for figuring up things."

The illness and death of his wife added to his affliction and nervous exhaustion; during her last illness, his son, Nathan, says that he was "as near to a crazy man as you could come, and not be crazy; he would walk the floor wringing his hands and not sleeping any."

It was at this time, when his wife was dying in the adjoining room, and he himself was in the condition described by the witnesses, that the final transfers of his partnership and individual property were completed.

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The partnership interests were conveyed upon the 2d of July, 1861, the individual real estate in Nassau street, upon the fifth, and his wife died upon the seventh of the same month.

This brings us to the consideration of the extent and condition of Nathan's property and business affairs, at the date of the failure of the Artisans' Bank, which occurred about the 1st of October, 1860, and to the conduct of the defendant with respect thereto.

The brothers were equal partners; Nathan having an equal one-half interest in the refinery as well as in the mercantile business; also in the real estate and premises in Maiden lane and Liberty place, where these departments of the business were respectively carried on; also in a house and lot on Second street in this city; also in a lot in Buffalo, and a farm in Cayuga county, in this State, and also in certain lands in the States of Vermont, Michigan, Iowa, Minnesota, Mississippi and Texas. Individually he owned the parcel of land with the buildings thereon, known as Nos. 119 and 121 Nassau street, in this city, and also certain farms and lands in Cayuga and Wayne counties, in this State.

Nathan's interest in the firm appeared to amount, by the balance-sheet of February, 1860, to \$221,097.51, and by that of February, 1861, to \$177,791.87.

The Nassau street property was found, and upon sufficient evidence, to be worth \$125,000. It was mortgaged to the amount of \$72,426.01, with some unpaid interest, leaving an equity of about \$50,000; the Cayuga and Wayne county lands were variously estimated at from \$75 to \$150 per acre, according to location.

If these balance-sheets represented any thing like the true value of Nathan's interest in the firm, and there is no just reason to doubt that they did, and even if the plaintiffs' witnesses considerably overestimated the value of the Nassau street property, and the Cayuga and Wayne county lands, still Nathan must have been worth, upon a reasonable and moderate view of the evidence, at the time of the failure of the Artisans' Bank, not far from a quarter of a million dollars. By the transfers which have been set aside, this entire property was acquired by the defendant without the payment of a single dollar. The only consideration which it is pretended that Nathan received was the sum of \$1,034.60, and there is no sufficient evidence that even that amount was actually paid.

The dates of the transfers were as follows:

1. October 18, 1860. All Nathan's interest in the refinery busi-

ness. This was effected solely by entries upon the partnership books.

2. October 20, 1860. All Nathan's interest in the Maiden lane and Liberty place real estate. Effected by formal deeds.

3. July 2, 1861. All Nathan's right, title and interest in the business, and in the remaining joint interests. Effected by a formal instrument reciting the consideration of \$1,034.60.

4. July 1, 1861. The individual Cayuga and Wayne county lands.

5. July 5, 1861. The individual Nassau street property.

The transfers numbered "four" and "five," were effected by conveyances confessedly voluntary and without consideration.

It is claimed that whatever the court may think respecting the conveyances of 2d and 5th of July, 1861, those of the preceding October must be sustained. It is argued, that, as to the latter, there is no direct evidence of undue or improper influence; that Nathan had not sunk so low, either physically or mentally, as to weaken or impair his full contracting powers; that it is in evidence that he himself, as well as the defendant, directed the book-keeper to make the entries whereby the refinery was transferred, and that these transfers were for a full and adequate consideration.

It is true that there is no such direct evidence of pressure, influence and threats, with respect to the October transfers, as we find when considering those of the following July; but the fallacy of the argument consists in treating each conveyance separately, and as a transaction independent of and disconnected with the other; whereas, an examination of the whole case makes it clear that they should be viewed as an entirety, and considered as part and parcel of the one transaction, by which the defendant acquired substantially the whole estate of his brother.

If direct threats were made, and undue influence used to procure the July transfers, such threats and influence plainly characterize the earlier transaction. The evidence of this unity of purpose and design runs through the case.

It commenced when the failure of the bank was imminent, and took the form of the defendant's anticipating large liabilities and judgments against Nathan, and the expression of a desire on his part to sever the business connection, and to protect his brother's property and interests. This the defendant substantially admits; he expressly admits that "on all occasions the simple idea

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was, that it was necessary for me to dissolve with my brother in consequence of his embarrassed condition ;” and, when asked if he had stated to William H. Platt that he expected “large judgments against Nathan,” that he “wanted to have the whole thing in his own hands, and have absolute control of it, and that, unless this was done, the business would be stopped, and people come in to examine, and all that he wanted to avoid ;” he replied, that there was “something to that report, though not of such an extended character.”

The danger to be apprehended from his brother’s creditors, both to Nathan, individually, and to the firm business, and his desire (in absorbing all) to protect both for the sake of Nathan and his children, was the ground-work of all that followed, and the key-note of the defendant’s success.

It secured as his allies Nathan’s children, who believed both in the apprehended danger, and in the promise of protection, and thus withdrew from Nathan the disinterested support and protection of his three grown sons. It enabled the defendant to act with perfect openness, lulled all suspicion, and insured the co-operation of the book-keepers and employees of the firm, and all who were friendly to Nathan and his family. As one of them testified, “We all concurred in the necessity of the thing under the circumstances.”

The sons were won over by such language as this ; “he began telling me,” says William H. Platt, “the trouble my father was in, the amount of debts he owed, and the judgments probably coming upon him. He was figuring up, and estimated the amount as something over \$200,000, putting in all the mortgages on his real estate, and he remarked the property would probably bring nothing. There would be a large judgment for deficiency, and others would follow, and every thing would be swept away, and he wanted the property all placed in his hands, all turned over to him, and in order to stand, it must be a *bona fide* transaction. He said he would take all, and after the trouble was all over, he would account for it, and it would come back to us, as a donation.”

Two facts will be noticed in this connection. The first is, that the apprehension of danger was illusory, as the sequel proved. It is true the Artisans’ Bank involved Nathan in some litigation, but he defended himself without doubt as to the result, and in the end he was substantially successful, and, in effect, relieved from all liability. Indeed, Nathan’s troubles never proceeded from the fear of con-

sequences, but entirely from the mortification and discouragement consequent upon the failure of the institution over which he had presided, and for the success of which he felt himself responsible. At one time he expressed himself decidedly upon this point, and declared that there would be no difficulty, if his brother would only stand by him to the extent of a few thousand dollars.

The other fact is, that according to the defendant's present theory Nathan's property and interests were of no value whatever, and in fact, there was nothing for creditors to reach, nor for him to "protect."

In view of such facts there would seem to be no rational explanation of the defendant's course, except upon the theory that the apprehension of immediate danger, if believed in at all, was greatly magnified, and, at all events, was put forward as the means, in connection with the promise of protection, donation, etc., to effect the desired end.

But, even as an independent transaction, the October transfers could not be upheld. Partners may, of course, as the learned counsel for the defendant insists, make any contract they please, as between themselves, for the purchase or sale of the whole or any part of the firm property. But there is no evidence that these transfers were the result of any such contract. The Maiden lane and Liberty place real estates were taken by the defendant, at prices so inadequate as to preclude any such idea; and for the refinery, the defendant was charged an amount not only inadequate in itself, but evidently fixed without proper investigation. The claim of a deliberate contract, based upon a full and adequate consideration, is unfounded both upon the testimony of the witnesses, and the facts, not in dispute, with respect to the books.

A regular set of books was kept in the mercantile, but not in the refinery, department. We have seen that the latter establishment was under the exclusive superintendence of the defendant, and that Nathan knew little or nothing about it. In answer to the charge of loose management, the defendant claims that the transactions in bullion "closed themselves up, and required no complicated set of books."

However that may be, the only record of the refinery transactions, contained in the regular firm books, consisted of an annual balance taken from the inventory sent in by that department in the month of February of each year. These inventories were on loose sheets,

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and were not retained after the general result had been transferred to the refinery account in the regular firm books. Such books as were kept in the refinery, a cash and some memorandum books, were demanded upon the trial, but the defendant declined to produce them, and neither of the persons who kept such books was called as a witness. Without considering other charges of fraud made by the plaintiffs in this connection, namely, in the drawing of moneys by the defendant from the refinery, which the plaintiffs assert were not stated at the end of the year as assets of the firm, enough has been shown to indicate the impossibility of accuracy or precision in the sum for which the refinery was turned over to the defendant.

The rules governing such a transaction are well settled. In their dealings with each other, partners occupy a position of trust. They are held to the utmost good faith; a purer and more elevated morality is demanded of them than the common morality of trade, and the standard by which they are tried in a court of equity is far higher than "the standard of the world." *Blisset v. Daniel*, 10 Hare, 493, 536. These principles are peculiarly applicable to the case of a dissolution and transfer of his share, by the retiring member to his copartners. Equity will scrutinize such agreements closely and watchfully, and will not permit them to stand, if it can discover that they were brought about by concealment, unfairness, or other unconscionable conduct. *Maddeford v. Austwick*, 1 Sim. 89; *Clements v. Hall*, 9 De G. & J. 186; *Perens v. Johnson*, 3 Sma. & Gif. 419.

One member of a firm has no right to make use of his peculiar and exclusive knowledge of the state of the business, or the condition of accounts, to obtain advantage of his less informed partner. The vice-chancellor said in *Maddeford v. Austwick*, *supra*, that "the defendant, being the partner whose duty it was to keep the accounts of the firm, could not in fairness deal with the plaintiff for his share, without putting him into possession of all the information which he himself had, in respect to the accounts."

In this case there was no direct proof of any misrepresentation, and the vice-chancellor remarked, "it is, however, *to be inferred* that the defendant must have stated to the plaintiff that the terms proposed by him were a fair consideration."

The observation first quoted fully meets this branch of the present case. The defendant dealt with exclusive knowledge of the refin-

ery; Nathan, with nothing save the general result, which the defendant had thought it sufficient to have annually recorded in the firm books.

Under these circumstances, and in view of the other facts established by the plaintiffs, a *prima facie* case was clearly made out, and the burden of proof was shifted to the defendant. It became incumbent upon him to show that the transfer of the refinery was the result of investigation; that the consideration was fair and adequate, or, at least, that it was arrived at after Nathan had been afforded the same light which he himself possessed, and generally, that the agreement, to quote the language of the vice-chancellor, in *Lyon v. Home*, L. R., 6 Eq. 655, was the "pure, voluntary, well-understood act" of his brother's mind, "unaffected by the least speck of imposition or undue influence."

Nor can the claim of Nathan's full mental power at this period be admitted. His mind was dazed by the shock which it had just received, and against which it was never able to react. But two months later we find the first entry in the extraordinary diary to which reference has been made. Certainly he had not sunk so low, either physically or mentally, as when the July transfers were procured; but the difference was only in degree, and while it is difficult to draw the dividing line, or to measure the precise extent of his powers at any particular time, yet it can safely be asserted that at all times, from the failure of the bank until his death, this sick and broken down man stood in need of considerate and constantly increasing care, and of the wise, honest and affectionate guardianship of those who were near and dear to him. It would be quite natural for such a man, under such circumstances, to lean upon his elder and only brother, who had been the business partner of his life, and so far, at least, as his property and worldly interests were concerned, to look to him for advice, assistance and strength; and the influence at such a time, whether for good or evil, of the strong, well man, and the elastic and unimpaired mind, would necessarily be great and overshadowing. Upon the whole, we think that we are quite within bounds, in holding, upon this branch of the case, that at no time, after the failure of the bank, had Nathan the capacity to suspect the designs, or the energy to resist the will of the defendant.

If, therefore, Nathan himself directed the book-keeper to charge the refinery, and the Maiden lane and Liberty place property, to



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the defendant, he simply yielded, without suspicion, to the defendant's will. The latter never spoke of these transfers as a purchase, never referred to them as the result of a bargain or contract.

He simply expressed his intention "of taking them to himself," of "taking the store property and the refinery, to protect them from Nathan's liabilities," a purpose quite consistent with the plaintiff's theory of undue influence, and entirely inconsistent with defendant's of an ordinary bargain, with a man of fair intelligence, upon an adequate consideration, and with full opportunity of inquiry and knowledge.

We now come to the consideration of the July transfers.

The yearly balance-sheet of February, 1861, has been referred to. In May, 1861, the defendant directed a fresh inventory and balance-sheet to be made up. This was with a view to the dissolution of the firm, and to the July transfers. At this time Nathan was at home sick, and the balance sheet was made out under the exclusive direction of the defendant.

It was prepared for the purpose of reducing Nathan's interest to the smallest possible figure, yet it resulted in showing \$86,032.86 as still standing to his credit. The defendant was not satisfied with this, and expressed a determination to "wipe out" Nathan's interest altogether. He stated to the book-keeper that "Nathan must not have any thing to his credit at all, or nothing of any consequence." The result was the preparation of another balance-sheet, by which Nathan's interest was reduced to \$1,034.60. This was accomplished by what, but for the defendant's public professions of sympathy with his brother, and the good intentions which he expressed regarding him and his family, would have been understood by every one concerned to be a deliberate fraud. It was done in this wise: One hundred shares of Artisans' Bank stock, which was owned by the firm, and had become worthless, was charged to Nathan. Moneys which appeared upon the books to be due by Nathan's sons were charged directly against their father. All the western and other lands of the firm were taken by the defendant, at low valuations. Twenty-five per cent was deducted from the cash value of the merchandise, which brought about an "estimated loss" of \$45,183.76. The losses on the bills receivable were "estimated" at \$25,720, on the open accounts at \$95,437.97.

A great deal of very irrelevant and inconclusive evidence was taken at the trial, with a view of proving that a deduction of twenty-

five per cent upon the cost price of the goods would have been reasonable and proper, upon a sale, by the firm, of its entire stock, or upon a "dissolution between two partners, one of them taking the whole stock at a cash valuation."

The goods had been inventoried in the preceding February, at their cash value; but, apart from that, these deductions were not made upon consultation with Nathan, or in pursuance of any agreement between the partners. There was no question before the court of the reasonableness of any contract, unless a contract can be made by one person. The false charges and the deductions were made by the defendant, arbitrarily, and for the sole purpose of making it appear upon the books, and in the balance-sheet, that his brother's interest in the firm was worth little or nothing. The evidence is conclusive upon this head.

William H. Platt testifies, that after certain deductions had been made, the book-keeper showed the defendant something upon a slip of paper, whereupon the latter remarked, "that won't do; he must not have any thing to his credit at all; there must not be any thing to his credit, or nothing of any consequence."

And again, "he (the defendant) simply ordered it (the twenty-five per cent) off; he found twenty-five per cent would effect his object, and he did that." Mayhew, the book-keeper, testified to the defendant's declaration, that "it was necessary that Mr. Nathan C. Platt's interest should be made as small as possible," and he thought the expression was used, "that Mr. Nathan C. Platt must be wiped out of the concern entirely."

Spencer C. Platt heard the defendant say, "that Nathan's interest was too large; it must be still further reduced."

Nathan, Jr., saw the book-keeper show the defendant a slip of paper, and heard the latter exclaim, "the devil! that won't do; that is entirely too large; it must be cut down."

Some of this the defendant denies; but the weight of evidence and the surrounding circumstances are clearly against him. The expressions testified to by Mayhew are scarcely denied by such testimony as this:

"Q. You never used the expression 'wiped out?'"

"A. I *don't think* I did; it is not a term I use."

Nor such as this:

"Q. Mr. Spencer C. Platt testified to several conversations in which you use the expression that 'Mr. Nathan C. Platt's interest

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must be wiped out or made as small as possible; did you ever make use of any expression of that kind?"

"A. *Not as regards the smallness*; the idea of an entire separation of my interest from Nathan's, I expressed and thought."

Even Nathan was roused to a temporary and feeble resistance to the execution of the final transfer, which was based upon this last balance sheet; the story of its execution is told by Nathan, Jr., as follows:

"Q. What did Mr. George W. Platt say or do about that paper; did he have that signed in your presence?"

"A. On the 1st of July, 1861, he came to the side door and said, 'Nat, I want you to go up to your father and have this paper signed;' he said it was a very strong paper, and appeared to be very much pleased about the paper being so strong, and said the creditors could not come in to rip that up; he wanted me to go up and have it signed, and he could sign it, and I could witness both signatures."

"Q. What did you do?"

"A. I went up to the house and returned in about two hours with the paper unsigned, and told him that father would not sign it; that he did not see any use in signing it; that if his brother would stand by him with a few thousand dollars, he could save all his property and get out of his trouble; Mr. Platt said my father must be crazy, that the creditors would strip him of every thing, and he would see Nathan about it; that afternoon he went up, and returned between half-past four and five o'clock, and said he had seen Nathan and had a terrible time with him; he was obstinate, strong headed, and he would not do it, until he threatened to cut him off as a brother and give him further trouble, and father then consented to sign it; on the following day, Mr. George Platt and myself went up together, in the cars, and went to my father's room; he was in bed; I assisted him to his chair, and when we were in the room George said, 'well, Nathan, we have come to have that paper signed;' father took a pen and signed it, and said, 'There brother, I hope that will satisfy you,' and he cried doing so; George said, 'Nathan, that is for your benefit; that is the last of your trouble;' we left the room together."

This is partially corroborated by William, as follows:

"Q. Now tell what passed between him and you; what he said then and afterward, until the paper was signed; narrate what occurred, in its order, as you now recollect it?"

"A. After he showed it to me, he said he would send my brother

up to the house to have it signed ; I saw my brother leave the store that afternoon.

“ Q. You say you saw him leave the store that afternoon ?

“ A. I saw my brother leave the store to go up.

“ Q. With a paper ?

“ A. To go up with a paper to have it signed. Late in the afternoon, my uncle, George W. Platt, came to me, seeming very much excited in his manner, saying he just had a terrible time with my father ; that my father was wild and crazy, and he did not want to sign it ; that he had a terrible struggle to get him to consent to make these transfers ; he had to tell him plainly, that unless he did so his family would be ruined, and more than that, he said, ‘ Nathan wanted me to promise to give it all back to him, and I did promise to do so.’

“ Q. These remarks he made before or after the paper was signed by your father ?

“ A. Before the paper was signed ; he went up in the afternoon to see him about it ; to get his consent to signing it.

“ Q. This was after he came back that afternoon ?

“ A. Yes.

“ Q. Go on and tell any thing further he said about it ?

“ A. These remarks were made in the afternoon ; he said he had this terrible struggle with my father to get him to do this, and he finally got him to consent to make these transfers, by promising him to give it all back to him ; that he did so to save his family from being ruined ; it was necessary for him to do so.”

This is testimony, which, if true, characterizes the entire conduct of the defendant, and is decisive of the case. It would be impossible for any right-minded court or jury to hear such testimony and to give it credence, without feeling pity for the one and indignation against the other of the actors in this unhappy scene.

We have, therefore, analyzed the defendant’s denials with care, and we regret to say, that they are by no means unqualified, as claimed by his learned counsel. The language of Nathan, Jr., which we have quoted, was repeated to the defendant, and he was asked if any such scene occurred. His answer was as follows :

“ I think there may be something in it, not regarding that paper at all ; there was another paper which there was some trouble about getting signed, but these papers, these dissolution papers there was no trouble about.

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"Q. Is that true in reference to the partnership paper?

"A. It is not true.

"Q. Do you recollect any paper, in reference to which there was something of that kind occurred?

"A. I do; there was some trouble, some hesitancy on his part to signing a paper which was a lease on the Second street property there."

Now, it will be observed, that the scene itself is substantially undenied, but transferred to another and unimportant event.

The Second street property was inventoried at but \$2,600, and the question of a lease-must, therefore, have involved a very insignificant sum. The criticism is irresistible.

Would Nathan have cried about so trivial a matter? Would he have said, "there, brother, I hope that will satisfy you?" Would the defendant have replied, "Nathan, that is for your benefit; that is the *last of your trouble?*"

Further, it appears that this Second street lease was not signed nor executed in the defendant's presence at all, and was not the subject of any trouble, objection or hesitancy, for the defendant himself put in evidence Nathan's letter to him, of June 28, 1861 (four days *before* the final transfer in question), in which Nathan says, "Dear brother: I *send you* herewith all the papers you left with me for signature and acknowledgment, except three. One relating to the lease of Second street, *I have signed and acknowledged*, and sent to the register's office to be recorded."

It is but too plain, therefore, that the sad story told by Nathan, Jr., is the truth of the case.

It is unnecessary to consider the circumstances attending the later conveyances, as they were confessedly voluntary, and made so shortly after the scene which has been described, as to bring them clearly within its shadow. We may say, however, that in none of the transactions had Nathan the benefit of legal advice; and we have seen that those about him had been induced by the defendant's plausibility to believe in the justice and wisdom of all his plans. Thus Nathan was completely subjected.

The voice with which he gave the book-keeper his directions, in October, 1860, was but the echo of his brother's voice. The hand with which he signed the dissolution of May 23, 1861, the approval of the statement of the account, and the final transfers, was, to all intents and purposes, the hand of the defendant. The means

adopted were the creation of unnecessary excitement, apprehension and alarm; the cry of danger, which was illusory and fictitious; the making of pledges, which were false; the manipulation of balance-sheets, which were fraudulent; and, finally, downright threats, intimidation and domination of an unusually cruel and heartless description.

The end sought was the complete spoliation of Nathan, and it was accomplished.

The equity rules applicable to such a state of facts were correctly laid down by the special term. They were, if any thing, understated. So far as the conveyances, which were confessedly voluntary and without consideration, are concerned, the burden was upon the defendant of proving that the transaction was fair, proper and righteous, and that Nathan's acts were "acts of rational consideration, of pure uninfluenced volition." *Coutts v. Acworth*, L. R., 8 Eq. Cas. 558; *Hoghton v. Hoghton*, 11 Eng. L. & Eq. 134; *Wollaston v. Tribe*, L. R., 9 Eq. Cas. 44. Ordinarily, and where there are no intimate or peculiar relations between the parties, this proof is given, if it be shown that the donor thoroughly understood what he was doing, and was protected by independent advice. *Phillips v. Mullings*, L. R., 7 Ch. App. 244; and *Hoghton v. Hoghton*, *supra*.

"If, however," as was observed by the Master of the Rolls, in *Hoghton v. Hoghton*, *supra*, "besides obtaining the benefit of this voluntary gift from the donor, the donor and donee were so situated toward each other, that undue influence might have been exercised by the donee over the donor, then a new consideration is added, and the question is not, to use the words of Lord ELDON, in *Huguenin v. Basely*, 14 Ves. 273, whether the donor knew what he was doing, but *how the intention was produced*; and though the donor was well aware of what he did, yet if *his disposition to do it was produced by undue influence*, the transaction would be set aside."

This latter doctrine proceeds upon different principles from those applicable to cases of strict trust.

Where the technical relation of trustee and *cestui que trust* exist, the law will not permit the former to bargain personally with respect to the trust estate, and declares such bargain, however pure as a matter of fact, to be fraudulent as a matter of law. This arbitrary but wholesome rule is founded upon reasons of public utility, viz.: To preclude the possibility of advantage being taken by the trustee of the position which he occupies.

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The defendant was not, as is now claimed by him, held to any such rule.

He was simply held to the rule which governs, as between donor and donee, in cases of voluntary conveyances, and as between grantor and grantee, in cases where the facts and circumstances "imply the exercise and dominion of influence" over the grantor's mind. Notwithstanding the overwhelming evidence bringing this case within the latter category, the defendant did not attempt to repel the presumption thus created; nor did he offer a particle of evidence tending in the remotest degree to establish the righteousness of the transaction, nor even that the grantor fully comprehended what he was doing.

The relation of blood and that of trust growing out of the partnership were dwelt upon, not as bringing the case within the category of technical trusts, and the rules appertaining thereto; but as indicating, when taken in connection with Nathan's feeble state, and the other facts of the case, a relation which implied the existence of dominion and influence, and which called for proof of the purity of the transactions.

Equity classifies the cases where bargains will be set aside as a matter of law, but never where fraud or undue influence is charged as a matter of fact. *Dent v. Bennett*, 4 Myl. & Cr. 269. Relief will never be denied, merely because the elements of some well-defined trust or fiduciary obligation are wanting.

"I will not," says the learned judge, in *Dent v. Bennett*, *supra*, "narrow the rule; or run the risk, in any degree, of fettering the exercise of the beneficial jurisdiction of this court, by any enumeration of the description of persons against whom it ought to be most freely exercised."

The jurisdiction, in fact, is wide enough to bring within its area all who come within the definition of "subjugator," and "subjugated," and the existence of intimate relations, whether of blood or partnership, or otherwise, may always be shown as bearing upon the question of influence and dominion.

Our conclusion is with the plaintiffs, in both aspects of the case. Assuming the burden of proof to be upon the plaintiffs, they have affirmatively established the existence of undue influence. They

have, therefore, established the lesser facts, from which the exercise of dominion and influence are implied, and which shift the burden of proof upon the defendant.

The latter has neither answered the demand for such proof, nor has he attempted to meet what has been affirmatively established.

He protests that his lips are sealed by the rules of evidence, and that he is not permitted to disclose what took place between his brother and himself. In this he is not prejudiced, for his brother's lips are likewise sealed. It was the defendant's duty to have been prepared for such a contingency. As was said in *Dent v. Bennett*, above cited, "Of such a case, it may at least be said, in the language of Lord ELDON, in *Gibson v. Jeyes*, 6 Ves. 266, that those who meddle with such transactions take upon themselves the whole proof that the thing is righteous."

As was also said by Judge PORTER, in *Tyler v. Gardiner*, 35 N. Y. 592, in considering a case of undue influence, used to effect testamentary dispositions: "*It behooves such beneficiary to be provided with evidence*, that the instrument expresses the honest and spontaneous purposes of the person who is called upon at such a time to reverse the provision of a previous testamentary disposition, made in health and strength, in favor of those having clear claims upon the justice and bounty of the testator."

The learned counsel for the defendant, upon the argument, expressly disavowed any charge against Nathan of having made the conveyance in question with the intent to defraud his creditors, or any claim to retain the property, under the rule with respect to parties *in pari delicto*. By this, we understand, that if the inevitable logic of the case had brought us to such a conclusion, the rule was not to be invoked as a bar to the restoration of the property. It will not, therefore, be necessary to discuss the question as to whether, upon the theory of an intent to defraud creditors, the parties were really *in pari delicto*. But apart from that, as a matter of fact, neither party had any such intention.

So far as the defendant was concerned, his suggestion upon that head was, as we have seen, a mere *ruse* to alarm and win over Nathan's sons and the employees of the firm. As to Nathan, all the evidence shows that he neither feared his creditors, nor thought of defrauding them; and when he was required to sign the instrument which would have been most important in effecting such a purpose, he struggled and resisted, until overcome by the defendant.



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A point was made with respect to a part of the real estate which should be averted to. It was, that as the mortgages thereon were foreclosed, and the properties purchased by the defendant upon the sale, a new and independent title was thereby acquired, freed from any of the previous defects. The difficulty with this position is, that, as a matter of fact, these foreclosures were procured by the defendant, and were but a part of the general scheme, which has been discussed and found against him. The defendant's denials, from what we have seen as to other parts of his testimony, and the weight of evidence upon the other side, cannot avail him.

Without examining the evidence in detail, it will be sufficient to look at that bearing upon some of the more important of the properties, viz., that in Nassau street, in this city, and in Cayuga county, in this State. Mr. Murdock, the mortgagee of the Nassau street property, had an interview with the defendant, prior to the foreclosure, in which he says, that the defendant "wanted him to have it foreclosed, and said that he, the defendant, should buy it, unless it went at too high a figure." The following question was put to Mr. Murdock, upon cross-examination, eliciting the following answer.

"Q. Would you have foreclosed any way, if the interest was not paid, without reference to any suggestion from Mr. Platt?"

"A. I should not, because Mr. N. C. Platt was sick, and I was friendly with him; I might have waited until I came on the next time; I did not want the money."

William H. Platt also testifies as follows:

"Q. You said something about the foreclosure of the Nassau street property?"

"A. Yes.

"Q. Did Mr. George W. Platt have any thing to do with it?"

"A. Yes; he did; he started it to have it foreclosed.

"Q. Was the purpose of his doing it declared at the time?"

"A. He said it was to get a better title to it.

"Q. Were there foreclosures of the Cayuga county property?"

"A. Yes, several of them.

"Q. What do you know about the procurement of them?"

"A. I know that he started all of them; they were carried on by his direction.

"Q. The title was standing in his name all the while?"

"A. Yes.

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"Q. When the sale took place, what did he do about them ?

"A. I know that he sent me up there to attend to one sale, the 50 acres, which was sold on foreclosure. He told me that Mr. Wing, who held the mortgage, would be there, and it was all arranged with him to go up there and bid and buy, so that he could get the property ; his object was to keep it in such a shape as to be perfectly safe.

"Q. Did you go up and bid for him ?

"A. I did. There was no one there but Mr. Wing, Mr. Pingree, who acted for my uncle as his attorney, and myself. It was struck off to George W. Platt.

"Q. Mr. Pingree was the attorney who procured the foreclosure ?

"A. Yes.

"Q. He was employed by Mr. George W. Platt ?

"A. Yes ; it was all arranged ; we went to the court-house together."

It was quite unnecessary for the defendant to add the expense of a foreclosure sale to the amount due upon the mortgage, unless he had doubts in his mind or conscience as to the validity of the voluntary conveyances under which he held. The foreclosures were plainly collusive, and the defendant acquired no better title thereby. It was a change in form, but not in substance. In such a case no device will be permitted to stand between the injured party and his just rights, and neither he nor his legal representatives will be prevented from following the property, except in the case of a *bona fide* purchaser, for value and without notice.

It was also claimed that the present was a stale demand, and was barred by reason of the plaintiffs' laches.

There is no rigid or inflexible rule by which such an action is barred for any delay less than that specified in the statute of limitations. Within that limit the question is one of estoppel or acquiescence. Here there is clearly no evidence upon which to apply the rules governing an *estoppel in pais*. Indeed, it is quite plain that the defendant has lost nothing, nor suffered in any particular from the delay.

As to acquiescence, that is a question of fact, depending upon the peculiar circumstances of each case. The plaintiffs, as individuals, were almost as much in the defendant's power, after their father's death, as the latter had been when alive ; they found themselves

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poor, and dependent upon the defendant. They were in no condition to quarrel with him. Their eyes were not opened to defendant's intentions, until after their father's death; and although from the defendant's refusal, shortly after that event, to pay the interest upon their house, they knew, as they say, "that they must look out for themselves;" yet there is no reason to believe that they fully realized the previous conduct of the defendant, until a much later period; even after they had a full comprehension of its real meaning they were a long time in obtaining the necessary evidence to justify them in taking a stand against so wealthy and powerful an adversary. The books were examined with great difficulty, and the extracts were numerous, occupied much time, and had to be taken stealthily. We are of opinion, upon all the evidence, that acquiescence has not been made out, either expressly or by legal implication.

Some questions were raised as to the admission of evidence. The first was with respect to the admission of the diary, which has been referred to; this diary was clearly admissible, as tending to show the condition of Nathan's mind; it was a daily record made by himself, during the largest part of the very period which was the subject of judicial investigation; the state of his mind was stamped upon every page, and more reliable evidence was thereby afforded of the secret workings of his brain than could be expected even from eye witnesses. The envelope and checks were not, as we understand it, admitted for the purpose of verifying the truth of the diary, but as additional and contemporaneous memoranda, made by Nathan, in connection with the diary, and are, in substance, a part and parcel of this record of his mental condition.

If it were otherwise, they did not prejudice the defendant, for it would be difficult to say whether the weaker intellect is indicated by the verification of the facts so circumstantially narrated, or by their treatment as entirely imaginative.

It is claimed, also, that the court admitted oral evidence to establish a trust for Nathan or his family, and that this was error. No such evidence was admitted; the plaintiffs did not seek to establish a trust, but fraud and undue influence; and the fraud and undue influence alleged were not in refusing to carry out as a trust. The promise of protection and restitution made to Nathan's sons were mere incidents in the defendant's general scheme. For the purpose of establishing that general scheme, it is plain that all the defend-

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ant said and did from the beginning to the end was admissible, including, of course, the honeyed words whereby Nathan's sons were deluded; and the question to be then determined upon all the evidence was, whether a case of fraud and undue influence was made out?

Some minor questions of evidence are touched upon in the briefs, but they are unimportant, and we think the questions were correctly decided.

With respect to these questions, as well as to those which have been discussed, we may, in conclusion, refer to the well-settled rule that in equity cases new trials will not be granted, unless it very clearly appears that undoubted injury has been done by the admission of the objectionable testimony. The court will always look at the entire case and see whether substantial justice has been done; and where that appears, it will affirm the judgment, notwithstanding the admission of testimony, which, in ordinary actions at law, might have necessitated a new trial.

In the present case there is no question, in our minds, that the judgment of the special term was just and righteous, and that it ought to be sustained.

The motion for a new trial must therefore be denied, with costs.

INGRAHAM, P. J., and BRADY, J., concurred.

*Motion denied.*

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BELDING, appellant, v. LEICHARDT *et al.*

*Will — execution of — publication by testator.*

In proceedings to prove a will, the evidence showed that the will was read in the presence of the testator and the subscribing witnesses by a person who, at the time, asked the witnesses to witness the execution. The testator then subscribed the will, and the witnesses at the same time signed their names to attest the execution. *Held*, that there was sufficient proof of the due execution of the will.

Although the request to witness the execution and the publication of a will are distinct acts in their nature, their performance may be joint or connected. A single sentence uttered by the testator may import both a request to attest the execution and a publication.

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THIS is an appeal from a decree of the surrogate of the county of New York, admitting to probate the alleged will of Samuel A. Belding, deceased. The facts sufficiently appear in the opinion.

*Albert Day*, for appellant.

*Winchester Britton*, for respondents.

FANCHER, J. This is an appeal from the decree of the surrogate of the county of New York, admitting to probate the will of Samuel A. Belding. The testator, at the time of its execution, was blind as to one eye, and partially so as to the other. He was very ill and feeble. The will was, however, read over to him and corrected according to his directions. One of the attesting witnesses was not examined before the surrogate because of his absence from the State. His presence at the execution of the will, and his signature as an attesting witness, were proved. One of the objections made to the probate of the will is founded upon the absence of any proof that the testator declared to Gallagher, one of the witnesses, that the instrument subscribed by him was his will. Our statute, relative to the execution and attestation of a will, provides that four distinct requirements shall be observed. They are each distinct and essential. The second of these requirements is as follows: 2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses.

The testimony shows that the two witnesses to the will were both present at its execution, and is sufficient to warrant the finding that the will was subscribed by the testator in the presence of each of the attesting witnesses. The testimony also establishes the fact, that, after the signature of the testator, the witnesses signed their names at the same time to attest the execution.

The will was read by Mr. Day, who was also present at the time, and the request of the testator was communicated through him to the witnesses at the same time to witness the execution. The witness who was examined testified that the testator had several times spoken to him about the will. He was not, before the execution, acquainted with Gallagher, the other witness, but was introduced to him when, and at the place where, the will was executed and witnessed. The witnesses were then and there requested, as above

stated, to attest the execution, and they did so. From what then transpired, it is deducible that the testator declared the instrument so executed to be his will. Any form of communication by the testator to the witnesses, whereby he makes known to them that he intends the instrument to take effect as his will, is a sufficient publication. *Coffin v. Coffin*, 23 N. Y. 15; *Lewis v. Lewis*, 11 id. 226.

Although the request to witness the execution and the publication are distinct acts in their nature, their performance may be joint or connected. A single sentence uttered by the testator may import both a request to attest the execution, and a publication of the will. *Rieben v. Hicks*, 3 Bradf. 353; *Coffin v. Coffin*, 23 N. Y. 17; *Baskin v. Baskin*, 36 id. 419.

We think the necessary formalities were observed in the execution, attestation and publication of the will. Some exceptions were taken by the contestant to the exclusion of certain questions that related to the supposed improper attitude of the testator toward the proponent. Whether the questions excluded were answered or not seems immaterial to any issue before the surrogate. He was not trying any question of morals, but was considering the capacity of the testator to make his will, and the statutory formalities required in its execution.

The only other points raised on the appeal relate to the alleged improper influence upon, and the want of capacity of, the testator at the time the will was executed. We have looked through the evidence touching these points, and think there is not sufficient ground for disturbing the findings of the surrogate.

The decree of the surrogate should be affirmed, with costs.

INGRAHAM, P. J., concurred.

BRADY, J. I am inclined to the opinion that the questions growing out of the testimony taken in this matter should be submitted to and passed upon by a jury. The decedent was an old man and a hard drinker. He was exposed, by reason of his habits, infirmities and surroundings, to improper influences, and was sometimes in a condition, more or less continued, which rendered him unfit to dispose of his property. I yield, however, to the opinion of my associates and the surrogate, and concur.

*Decree affirmed.*

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 Petition of Folsom to vacate an assessment.
 

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 PETITION OF FOLSOM *et al.* TO VACATE AN ASSESSMENT.

*Assessments — validity of — New York city — street pavement — publication of notice.*

Avenue B, in the city of New York, was paved under a resolution ordinance of the common council. Such ordinance was properly published according to law. The assessment for paving was never confirmed by the common council, but was confirmed by the board of revision and correction of assessments, created by Laws of 1861, chap. 308. Notice of the assessment was not published in strict accordance with Laws of 1841, chapter 171, § 1, although it was published in a large number of city newspapers: *Held* (INGRAHAM, P. J., dissenting), that by the proper publication of the resolution ordinance, which publication was a mandatory requirement of the statute, general jurisdiction of the subject-matter was acquired. All subsequent provisions of the statute relating to the form or manner of execution, or incident thereto, are directory, and in this class are the provisions relating to the publication in question, and the assessment was valid.

*In re Addison Smith*, 52 N. Y. 526, explained and distinguished.

APPEAL from the order of Mr. Justice FANCHER, made at chambers, May 22, 1873, denying the prayer of the petitioners to vacate an assessment for paving Avenue B, in the city of New York, with Belgian pavement. The petitioners object that the assessment was never confirmed by the common council, but was confirmed by the board of revision and correction of assessments created by chapter 308, Laws of 1861; also, that no designation of corporation newspapers was ever made by the mayor and comptroller under section 1 of chapter 383 of the Laws of 1870, and that no notice of the assessors as to the assessments, etc., was published in accordance with section 1 of chapter 171, Laws of 1841, or as required by law.

*Porter, West & Deering*, for appellants. The section cited of act of 1870 is mandatory. *In re Addison Smith*, 52 N. Y. 526; *Adriance v. McCafferty*, 2 Rob. 153; *In re Astor*, 50 N. Y. 363. Taken in connection with act of 1841, a failure to comply with such section is fatal to the assessment. 5 Mich. 104; 14 Ill. 223; *Westfall v. Preston*, 7 Alb. L. J. 154; *Corwin v. Merritt*, 3 Barb. 341. Chap. 308 of Laws of 1861, so far as it creates the board of revision, is unconstitutional. *People v. O'Brien*, 38 N. Y. 193; *Huber v. People*, 49 id. 132.

*E. Delafield Smith*, counsel to the corporation, for respondents.

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Petition of Folsom to vacate an assessment.

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BARRETT, J. I think this case is distinguishable from that of *In re Addison Smith*, 52 N. Y. 526, in several particulars:

1. In the first place, general jurisdiction of the subject-matter was here acquired by the proper publication of the resolution ordinance.

It was because such jurisdiction was never acquired, by reason of the failure to publish such resolution according to law, that the assessment in the case of *Addison Smith* was vacated. The previous publication of the resolution ordinance is the essence of the thing required to be done. It is that which is mandatory.

Jurisdiction having been thereby acquired, all subsequent provisions of the statute relating to the form or manner of execution, or incident thereto, are directory. In this class are the provisions relating to the publication in question.

2. Again, the provisions of the city charter, which were the subject of consideration in the case of *Addison Smith*, are prohibitory in terms. The passage of such resolutions are thereby expressly prohibited, unless previously published, according to its requirements. The section of the act of 1841 which is now invoked (Laws of 1841, chap. 171, § 1) contains no such prohibition. It simply makes it the duty of the commissioners and assessors to give the parties interested notice of the completion of the estimate and assessment, and then specifies the mode of publication.

3. The petitioners were not prejudiced, in fact. The publication was actually made ten times in ten daily, and four times in five weekly, newspapers in this city. The petitioners do not pretend that they did not observe any one of such publications, nor that they were deprived, by want of actual notice, of the opportunity of presenting any objections which they had to the estimates or assessments. They simply seek, upon a pure technicality, and without any real grievance, to throw the burden which they ought to bear upon the general tax payers, and upon the city at large.

I think the order refusing to vacate this assessment should be affirmed, with costs.

BRADY, J., concurred.

INGRAHAM, P. J., dissenting. The late decision of the court of appeals (*In re Addison Smith*) sustains the position that if the officers directed to designate papers in which the proceedings are to



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be published neglect to do so, it is fatal to any proceeding in which such publication is required by law. The general course of decisions on similar questions in that court tends to show that in all such cases the court considers the publication to be mandatory, and the omission to publish to be a jurisdictional defect. We have, on several occasions, attempted to draw a distinction in some of these cases; but our decisions have been reversed, and we see no other course to adopt than to hold that such omission to advertise is fatal to the proceedings.

In the present case it is conceded that the designation of papers was not made, and it is attempted to sustain the proceeding by publication in papers designated in former years. Under the decisions, we think this cannot be done.

Order must be reversed, and order entered vacating assessment.

*Order affirmed.*

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HOFFMAN, appellant, v. TREADWELL *et al.*

*Principal and agent — special agency — husband and wife — presumptions of fact.*

The husband and the son of plaintiff were indebted to the defendant for moneys wrongfully converted. The husband procured from the plaintiff a deed conveying real estate owned by her to defendant. The deed was executed and acknowledged by the wife, and given by her to the husband at his request. No directions were given by her to him as to what he should do with it. The consideration expressed in the deed was \$25,000. The husband gave the deed to defendant, by whom it was accepted as payment of the indebtedness.

*Held*, that the husband was merely the special agent of the wife, and she was not bound by his acts beyond the limits of the authority conferred, which did not permit him to deliver the deed in settlement of his own indebtedness, and it was the duty of the defendant to ascertain and know the extent of the powers of such special agent.

The utmost that could be inferred from the possession of the deed was, that the husband had authority to sell the property described in it for the consideration expressed to be paid to him as his wife's agent. *Bank of Albion v. Bemis*, 46 N. Y. 170, followed.

ACTION to set aside and avoid the deed hereinafter referred to. The plaintiff, a married woman, was the owner, as her separate  
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property, of certain real estate which was occupied as a dwelling-house by her family, consisting of L. M. Hoffman, her husband, and Ring Hoffman, her son.

These last-named two persons were copartners doing business as brokers under the firm name of L. M. Hoffman & Co., and had become indebted to the defendant Wm. E. Treadwell in a large sum of money which they had held in trust and wrongfully converted to their own use.

Subsequently, at the request of her said husband, the plaintiff executed and acknowledged a deed to the said real estate, which had been previously prepared by her said son, conveying the same to the defendant, Wm. E. Treadwell, which deed the plaintiff gave into the hands of her said husband, at his request, and, in consequence thereof, without giving him any directions as to what he should do with it. She testifies that she knew that it was a paper having reference to the house and lot; that she did not at any time authorize him to deliver it to any person, or to make any use or disposition of it whatever; that she did not at that time know that Wm. E. Treadwell's name was inserted in the paper as grantee; that she did not remember any thing about the circumstances of acknowledging this deed, but had signed many papers at her husband's request, and had never inquired any thing about them; that subsequently she was informed that the paper was a conveyance to the defendant Wm. E. Treadwell. This deed was a conveyance in fee of the said premises to said Wm. E. Treadwell, reciting a consideration of \$25,000, and the said L. M. Hoffman delivered it to the defendant Wm. E. Treadwell in satisfaction of the said pre-existing debt of Hoffman & Co. Previous to this time the plaintiff had mortgaged the same property to one Gilman to secure a debt of her husband for \$3,000, which L. M. Hoffman discharged. There was also another mortgage on the property for \$6,000, and, some time after the conveyance to the defendant, this mortgage being called in, the defendants, at Hoffman's request, executed a new mortgage for the same amount, and paid off the original mortgage which was discharged. After the expiration of three years, Hoffman and the defendant, Wm. E. Treadwell, had a conversation about the continued occupation of the premises by Hoffman's family (Hoffman having, up to that time, paid the taxes and the interest on the mortgages), and Hoffman accordingly agreed to pay Treadwell \$2,000 per year, and paid him accordingly \$500,

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which went on account of his debt. The complaint was dismissed in the court below, and judgment given for defendant, from which this appeal was taken.

*Wm. R. Martin*, for appellant.

*Evarts, Southmayd & Choate*, for respondents.

BRADY, J. Unless the possession of the deed which the husband of the plaintiff delivered to the defendant, William E. Treadwell, authorized such delivery upon any terms which the husband might elect to make, then the plaintiff must succeed in this action. This proposition is based upon the fact that no consideration was paid to the plaintiff, or to her husband for her, and also on the assumption that the plaintiff knew the character of the instrument she was signing, although the evidence shows clearly that she did not. It gives to the defendants, therefore, all that they can claim on that subject. It assumes that the plaintiff knew that she was executing a deed of the property described and in favor of the defendant, William E. Treadwell, and for the consideration expressed. It cannot be assumed that she knew in what manner that consideration was by arrangement between her husband and William E. Treadwell to be paid, because there is no evidence which will warrant it. It may be assumed, however, in regard to the deed, that she knew its contents, because she executed and acknowledged it. It, therefore, becomes apparent that unless the husband of the plaintiff, by virtue of his possession of the deed, there being no other evidence thereto, was authorized to deliver it to the defendant, William E. Treadwell, in payment of a pre-existing debt, the delivery was wholly unauthorized, and that the defendant, William E. Treadwell, took no title. In order to determine this question, it becomes necessary to consider the rights of the plaintiff and the result of her relation to her husband, in reference to her separate estate. Whatever may have been the rule prior to the enabling statutes of this State in regard to married women in this respect, it is now settled that she holds her separate estate as a *feme sole*, absolutely, with full power to dispose of it as she may think proper. Her husband, in whatever he may attempt to do with or in reference to it, must necessarily, therefore, be her agent with the general or limited powers which such agency may confer. As an agent, he cannot, in the absence of express authority thereto

deal with the trust for his own benefit. Such a result has never been tolerated and cannot now become an element of our law. When he attempts to do so, the duty imposed upon the person with whom he seeks thus to deal is, to ascertain whether he has the power to do it, and particularly in a case like this, where the confidential relation of husband and wife existed between the principal and agent, to see to it that he have evidence emanating from the wife herself, and not only through or from the husband by his parol statement thereto, showing that he is vested with the right to do the act he undertakes to perform. The general rule is, that the principal is not bound by the acts of the agent, in case of a special agency, beyond the limits of the authority conferred. It must be strictly pursued, and it is the duty of a party dealing with a special agent to ascertain and know the extent of his powers; if he omit so to do, it is at his peril. *Martin v. Farnsworth*, 49 N. Y. 555. The same obligation is at once created which would spring out of the husband's position if he were representing or attempting to represent any other person. He does not derive any authority from his marital relation. The property is that of his wife, and she is to be treated in regard to it as if she were unmarried. If there be any distinction in such a case, it would be to enforce the rule more vigorously. The closer the tie the greater the liability to abuse, and hence the greater necessity for the vigilant application of that protection which the courts have applied to the relation of principal and agent, and have thrown around the separate estates of married women. *Comstock v. Comstock*, 57 Barb. 453; *Chauncy's Rights of Women*, 347, and cases cited.

These are familiar rules. What power or authority then did the plaintiff's husband derive from the possession of the deed? The question is answered by the decision in the case of *Bank of Albion v. Burns*, 46 N. Y. 170. It is, that the most that can be inferred from the possession of the deed is, that the husband had authority to sell the property described in it for the consideration expressed upon its face, to be paid to him as her agent. It was held in that case, that a mortgage given by the wife, for the debt of the husband, upon her separate property, could not be regarded as a continuing guarantee in the absence of proof that it was executed for that purpose. It was, indeed, suggested as doubtful, whether it would be competent for the mortgagee to show that the mortgage was given to secure any indebtedness to the amount of the mortgage

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that might accrue, instead of the specific obligation mentioned in it. The claim of the plaintiff in that case rested on the supposed agency of the husband to act for and bind the wife, the only evidence of such agency being the possession of the mortgage by the husband, and it was declared that the agency to be inferred from the possession of the mortgage must have respect to and be limited by the terms of that instrument. It could not be extended by implication. So, in this case, the agency must have respect to and be limited by the terms of the deed. It cannot be extended by implication. The husband was, therefore, only empowered to deliver it according to its terms; that is, upon the payment of the consideration. He was acting for her and not for himself. The cases are analogous and rest on the same principle. The converse of the proposition would revolutionize the law of principal and agent, and confer powers upon a special agent not delegated, not within the scope of his relations to his principal, and not recognized in the adjudications relating to the subject. The doctrine rests upon principles of natural justice and equity. No one shall be deprived of his property without his consent, and when a person claims the right to represent an owner he must be fortified with authority which may not be questioned. *Martin v. Farnsworth, supra*. The application of this rule to a case where the claimant, under an assumed power, is not a holder for value, becomes the more meritorious. He gives nothing for the grant, and loses nothing when it is withdrawn. It may be added here, as germane to the subject, that in this court it was held, upon due deliberation, that a note drawn by the husband of a married woman, acting by her authority as her agent, in reference to her separate business, could not be enforced against her by a *bona fide* holder for value, it appearing that it was not used in reference to her separate estate or business, but diverted by the agent. *Bogert v. Gulick*, 45 How. 385.

The right of the plaintiff to recover herein is declared upon the proposition, that the husband had no authority to deliver the deed upon any other than the terms expressed, namely, the payment of the consideration, and, therefore, the judgment must be reversed. It would, of course, be necessary to protect the defendants by a proper decree from the operation of the mortgage given by them at the request of the plaintiff's husband. It is also proper to say, that as the plaintiff proceeded to enforce her claim, when advised that there was a cloud upon her title, she cannot be charged either with

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acquiescence in or ratification of her husband's act. That result does not follow unless based upon knowledge of all the facts and the expiration of an unreasonable time, before remedy sought. *Seymour v. Wyckoff*, 10 N. Y. 213; *Nixon v. Palmer*, 8 id. 398; *Roach v. Coe*, 1 E. D. Smith, 175; Story on Agency, §§ 90, 91.

INGRAHAM, P. J., concurred.

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*New trial ordered.*

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PEOPLE *ex rel.* NAVARRO, appellants, v. GREEN, comptroller, etc.

*Statute construction* — *New York city board of audit* — *mandamus*. *Laws* 1870, *chaps.* 187, 363; 1871, *chap.* 218.

The relator furnished a quantity of water-meters under a contract with the city of New York, made through the commissioner of public works, under a special provision of chap. 383, Laws 1870, § 18. By chap. 213, Laws 1871, § 5, the comptroller of New York city is directed to raise on revenue bonds such amounts as may be necessary to meet the expenses incurred in procuring, connecting and setting the meters, and to "pay for the same, on the requisition of the said commissioner of public works."

*Held*, that the requisition of the commissioner was not final as to the right of the relator to compensation, nor was the comptroller upon its presentation bound to pay the sum named. The provision of the act of 1871, directing the comptroller to raise the money and pay for the meters, did not repeal §§ 37 and 39, Laws of 1870, chap. 187, which established an auditing bureau, and declared that moneys drawn from the city treasury should be upon vouchers examined and allowed by the auditor and approved by the comptroller.

*Held*, also, that a return by the comptroller to a mandamus to compel payment for such meters, that the sum claimed for the meters was not due; that the meters were not made of the best quality of brass, and were not such as were agreed to be furnished, etc., and that the contract between the relator and the city was entered into by fraud and covin, were material, and could not be stricken out.

The contract made with the city and the debt due under it could be enforced by action. But it did not necessarily follow that the relator was not entitled to mandamus to enforce his claim. In case a proper audit had been made and the comptroller refused to pay, mandamus might properly issue.

THIS is an appeal from order made by Mr. Justice FANCHER, refusing to grant relator's motion to strike out the whole or any

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part of respondent's return to the alternative writ of mandamus, to raise on revenue bonds of the city of New York and pay to the relator the sum of \$283,500 with interest, the amount claimed to be due to the relator for 4,050 water-meters furnished under a contract, dated August 22, 1871, made with the relator by the commissioner of public works. It was determined in *People ex rel. Navarro v. Van Nort*, 64 Barb. 205, that the contract in question was valid, and that a mandamus should issue to the commissioner of public works to make his requisition upon the comptroller for the payment of the price of the meters furnished. In obedience to this writ, the commissioner made his requisition upon the comptroller. The comptroller did not comply with this requisition, and did not proceed to act with a view to raise the money in question, and this mandamus was sought against him. The objections raised to the return appear sufficiently in the opinion.

*Alexander & Green, A. R. Lawrence and A. J. Vanderpoel*, for relator.

*E. Delafield Smith and J. C. Carter*, for respondent.

BRADY, J. We held on the application of the relator in *People v. Van Nort*, 64 Barb. 205, that the commissioner of public works was authorized under the provisions of the act of 1870, chap. 383, § 13, to select and to make, on behalf of the city, a contract for the delivery of the meters contemplated, and that the legislature made that transaction independent of the provisions of the charter affecting contracts generally. The contract made, therefore, between the relator and the city, through the commissioner of public works, was declared valid. We also determined that the relator, on his application, therefore, was entitled to a mandamus directing the commissioner to issue the requisition for which the act of March 29, 1871, chap. 213, § 5, provides, because it was necessary, in our judgment, to enable the relator to collect his claim, whatever it might be. We suggested that when the collection was essayed the city could then present any objections or defense of wrong done or fraud committed, if such a defense existed. The requisition upon the issuing of the mandamus was given, and the relator again presents his claim and seeks to compel its payment by mandamus, predicated his right to that process upon that requisition, and upon the act of March 29, 1871,

*supra*, which authorizes and directs the comptroller to raise, on revenue bonds, in anticipation of the moneys to be collected for the expenses of the meters, their connections, etc., such amounts as may be necessary to meet the expenses incurred in procuring, connecting and setting them, and to "pay for the same on the requisition of the said commissioner of public works." It was not decided by this court, on the former application mentioned, that an action could not be maintained against the city, but that the requisition was necessary to enable the relator to collect his claim, the comptroller not being called upon to pay any amount until a requisition, such as contemplated by the act, *supra*, was obtained. It was apparent to this court that when the process went forth, the object of which was to compel payment, the city would have the opportunity to present any valid defense that might exist. This court did not intend to declare that the requisition should be final of the right of the relator to compensation, or that the comptroller, upon its presentation, should pay the sum named. The only appropriation made to pay the relator's claim was that accomplished by the act of 29th March, 1871, the contract out of which it arose being, as already suggested, an exception to the general provision of the charter. The contract was made with the city, and the debt due under it, whatever that may be, is, therefore, one against the city, vesting in contract, and which may undoubtedly be enforced by action. This conclusion is too plain to require more than a statement of it. What the expenses would be, in procuring, connecting and setting the meters, would depend upon the number purchased and employed, and the price to be paid for the labor done, and would necessarily be subjected to the examination and settlement of the finance department, to be determined with reference to the contracts and the faithful performance and extent of performance of their obligations. The money to be raised was not only what was required to pay for procuring the meters, but for connecting and setting them, that is, placing them in the stores, etc., mentioned in the act of 1870, *supra*, authorizing the commissioner to use them in his discretion.

It is alleged in the return, that the claim of the relator has not been audited by the finance department in accordance with the provisions of the act of 1870 (chap. 137, § 37), which establishes an auditing bureau to audit, revise and settle all accounts in which the city is concerned as debtor, and which is followed by § 39, declaring



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that all moneys drawn from the city treasury shall be upon vouchers for the expenditure thereof examined and allowed by the auditor and approved by the comptroller. It is not alleged in the alternative mandamus that the audit mentioned was made, and it seems to be admitted that it was not; and we are, therefore, met upon the very threshold of this appeal by the question, whether it is not indispensable to the relator's right to a mandamus against the comptroller, that he should have handed his account to the finance department for audit and settlement.

It must be borne in mind that his contract is with the city, and his account is one in which the city is concerned as debtor, and in such cases, in the absence of any statute expressly to the contrary, the remedy is by action, unless the account is audited, and allowed, and approved in the manner provided by law. This rule was settled by the case of *The People v. Flagg*, 17 N. Y. 584. The provisions of the act of 1853 (chap. 217, § 12), considered and passed upon in that case, are almost precisely like those in the act of 1870 (chap. 137). The court held that the comptroller was not compellable by mandamus to draw his warrant in payment of services rendered, to the city, under the direction of one of the executive departments until such claim has been allowed by the auditing bureau, although the common council directed the payment of a specific sum. To the same effect, *People ex rel. Cunningham v. Brennan*, 18 Abb. 100. The answer to this proposition is, that the requisition of the commissioner of public works is final upon the comptroller, upon the presentation of which, under the statute of 1871, *supra*, it became his duty to pay; but this view is untenable. The cases cited and the argument advanced to sustain this response are ineffectual for that purpose. The provision of the act of 1871, authorizing and directing the comptroller to raise the money and pay for the meters, did not repeal the existing requirements under the act of 1870 (chap. 137), suggested, either in terms or by implication. The requisition of the commissioner was a certificate of the receipt of the meters, or a voucher, and nothing more in legal contemplation. The price was established by the contract, it is true, but the account was to be audited, nevertheless, in accordance with §§ 37 and 39 of such act, which declared that all accounts should be audited and settled in the manner stated, and that all moneys drawn from the treasury should be upon vouchers examined and allowed by the auditor and approved by the comptroller. The requisition of the commissioner

is of no higher authority than the resolution of the common council, so far as the finance department is concerned. The audit of an account, *ex vi termini*, imports judgment upon it (*People ex rel. Brown v. Green*, 43 N. Y. 224), and the exercise of that judgment required by statute cannot be declared suspended or destroyed by other than legislation too evident to admit a doubt of the intention of the legislature to suspend it in a given case. It is clear, however, that such was not the intention. The direction to pay relates to expenses other than those of procuring the meters, and if the view of the relator's counsel be correct, then the finance department would have no control over the expenses of connecting and setting the meters, but would be obliged to pay on the mere requisition of the commissioner. The effect of this would be, that he would become the absolute master of the situation, and invested with the power of determining by his own act the liability of the city. No such authority was conferred or designed to be. The selection of the meters was intrusted to him, but there, his authority as a finality ended. It was not intended to dispense with the auditing bureau, which was created as a check, and its office should not be held to have been taken away, unless such result is a legal necessity. In order to carry out the views of the relator, it would be necessary for us to hold, that the provisions of the charter of 1870 (chap. 137), in reference to the audit of accounts, were, in respect to his claim, repealed, that the comptroller was, therefore, obliged to pay him on the requisition of the commissioner, without further examination, and that such was the duty imposed on him by the statute of 1871, *supra*. It is proper to suggest here, that repeals by implication are not favored unless the several statutes are decidedly repugnant to each other. These under consideration are in harmony and of great value. We do not think we are called upon to declare the doctrine contended for. Nothing has yet been disclosed which will justify such a conclusion.

The cases to which we have been referred, on this branch of this appeal, were to the effect that where a municipal corporation or a ministerial officer is required to perform a duty, that is, to put the necessary machinery in motion to accomplish the object or purpose of the law, the writ lies to enforce it. A mandamus, for instance, to compel the common council of this city to create a public fund or stock to be denominated market stock was sustained. *People v. Common Council*, 3 Keyes, 83, *supra*. A mandamus would also issue to

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compel a committee of the common council to report where the duty to do so under certain conditions was imposed by law (*Buck v. City of Lockport*, 6 Lans. 251), and as stated in that case to compel a corporation to put the proper machinery in motion to raise the necessary funds, or to put the claims presented in proper shape for liquidation and payment. See, also, *McCullough v. The Mayor*, 23 Wend. 460; *People ex rel. Board of Education v. Bennett*, 54 Barb. 481; *People ex rel. Market Com. v. Common Council*, 1 Abb. (N. S.) 318; S. C., 3 Keyes, 81; *People v. Mead*, 24 N. Y. 114; *People ex rel. McSpedon v. Haws*, 34 Barb. 69, 2 Crary's Spec. Proc. 55, *et passim*, 119. And hence we directed the commissioner of public works to issue a requisition to put the necessary machinery in motion. We then enforced the discharge of a duty imposed, but nothing more. These cases do not establish the proposition, that where an action may be sustained the remedy by mandamus is concurrent with it, but that an action on the case for refusing to discharge the duty may be maintained, to which the relator will not always be driven. This principle is stated in the adjudications, and the distinction between an action on the case, for official misconduct, and an action to enforce the claim clearly pointed out. In *McCullough v. The Mayor*, *supra*, Justice BRONSON said, "although as a general rule a mandamus will not lie where the party has another remedy, it is not universally true in relation to corporations and ministerial officers. Notwithstanding that they may be liable in an action on the case, for the neglect of duty, they may be compelled by mandamus to exercise their functions, according to law. In these cases, and indeed in all the cases bearing upon this subject, the rule is conceded, that a mandamus is not the proper remedy for the recovery of money, where an action at law may be maintained for the same purpose. There are some exceptions to this rule, but the facts which create them must be not only conclusive in themselves, but admit of no question, and the liability must be one about which the law is not only well defined, but certain. In the case of *People v. Mead*, 24 N. Y. 114, which the council for the relator seems to regard as favorable to him, the mandamus was allowed on the assumption that an action could be brought against the town but would be inadequate, "for towns," said DENIO, J., "are not presumed to have any property liable to seizure on execution." If the proper audit were made of the relator's claim, for example, and it was one against the county, or one to recover which an action

could not be maintained, and the comptroller refused to pay, a mandamus might properly issue. *People v. Flagg, supra*. The whole machinery of the law would then be exhausted, and unless, on the application for the mandamus, some reason, founded upon discoveries affecting the justice of the claim, should be interposed, the relator would not be compelled to bring his action. His legal status would then be such as to command obedience from the comptroller. The subject under consideration is well illustrated by the case of *Ex parte Lynch*, 2 Hill, 45, which is referred to and approved in *People v. Mead, supra*. The supervisors of New York were, by statute, required to audit and allow the claim of the relator, and he sought by mandamus to compel the performance of that duty, but the court refused to grant that remedy, because he had a right of action against the city for his salary, which was regulated by statute, but otherwise *semble*, if the only remedy was by action on the case for official misconduct. The direction to audit and allow in such a case, where the sum to be paid is regulated by statute, is equally as conclusive and binding as the direction to pay under the act of 1871, *supra*; but it was held to be in subjection to the existing right of action and not enforced. "The writ of mandamus," saith Blackstone, Book III, p. 110, "is a high prerogative writ of a most extensively remedial nature, and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution to an office; but it issues in all cases where the party hath a right to have any thing done and hath no other specific means of compelling its performance." It follows from these views that the whole return cannot be stricken out, the allegation considered being a good answer.

It also follows that the allegations in the return, that the sum claimed is not due; that the meters were not made of the best quality of brass, and not such as were agreed to be furnished; that they were not worth more than thirty-five dollars each, with their connections and setting; and that the contract between the relator and the city was entered into by fraud and covin, are material and cannot be stricken out.

These are issues which the respondent had the right to create, but the other parts of the return are immaterial and must be stricken out. The contract was legally made in form and is binding upon the city, unless destroyed by the charge of fraud being proved.

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The appropriation was made in 1871 to pay the obligations incurred by it, and by enactment, to which reference has been made, and which was not repealed by subsequent legislation. It may be that the provisions of the charter of 1870, *supra*, in relation to the audit and settlement of accounts in the finance department, were by chapters 9 and 375 of the Laws of 1872 repealed, as to the relator's claim, and, if so, then it may be necessary for him to show that it was audited and allowed as provided by these acts, namely, by the concurrent vote of the members of the board of audit and apportionment. The second section of chapter 9, *supra*, and of which chapter 375 is an amendment, seems to embrace all claims remaining unpaid for supplies and materials furnished during the year 1871, for the purposes of the various departments; and if the relator's demand is embraced therein, and it seems to be, then an audit by the finance department, under the law of 1870, *supra*, would not be sufficient. The court of appeals has recently so declared in the case of *People ex rel. Brown v. Green, supra*. The powers possessed by the board of audit and apportionment conferred by the acts of 1872, *supra*, have been vested and continued in the new board of assessment and apportionment, created by chapter 335, Laws of 1873, § 112.

The order made at special term must be modified, in accordance with the conclusions herein expressed, if the relator designs to continue these proceedings. It is patent, that if the audit of his claim required was not made, he cannot succeed herein, and must resort to his action, which will be governed by other legal rules.

*Ordered accordingly.*

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BOODY v. DREW *et al.*, appellants.

*Demurrer — improper joinder of defendants — accounting.*

Plaintiff and a number of others associated together for the purpose of operating in the stock of a railroad company. They appointed four of their number as managers, who were to buy and carry the stock until a specified time, when the stock was to be divided among the associates in specified proportions. The associates were to furnish the means in certain agreed proportions, and were to share the profits or losses in like proportions; the man

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agers were to take title to the stock in their own names, and were to engage in certain transactions in respect to the stock for the mutual benefit of all, but were not to deal in the stock of the company in question upon their own individual account. At the time designated for terminating the agreement the managers represented that they had on hand a certain number of shares of the stock, which had cost a specified sum, and demanded of plaintiff and other associates that they should respectively take up and pay for their ratable proportion of shares, which demand was complied with by plaintiff.

Plaintiff brought action against the managers and the other associates, setting forth, in his complaint, the foregoing facts, and alleging that the managers had violated their agreement not individually to deal in the stock, had improperly managed their trust, made improper charges and had not properly accounted; that upon a proper accounting between the managers and the associates, and between the associates themselves, a large sum of money would be found due the plaintiff, and prayed that an accounting be had from the managers, and between the associates.

*Held* (INGRAHAM, P. J., dissenting), that plaintiff's right to an account was upon the facts stated against the managers alone. An adjustment having been made between the managers and plaintiff, and, presumptively, the rest of the associates, he cannot elect for the other associates to undo that adjustment merely because he is dissatisfied, and a demurrer to the complaint, upon the ground of an improper joinder of the associates with the managers, as defendants, should be sustained.

THIS was an action to compel an accounting. The complaint is sufficiently set out in the opinion. To this complaint the defendants Drew, Cortwright, Baylis and Cox, who are described in the complaint as "*the managers*," demurred, upon the ground, first, that the plaintiff could not commence an action on his own behalf without joining the other associates, and that the other associates should have been made parties plaintiff, instead of parties defendant; and, second, that the settlement of the accounts of the "*managers*," and the settlement of the accounts of all the defendants, who are described in the complaint as "*the associates*," were two causes of action which could not be joined.

A motion for judgment, on the ground of the frivolousness of the demurrer, was denied. Afterward, on argument, the demurrer was overruled, with leave to answer. From the order overruling the demurrer this appeal was taken by the so-called "*managers*."

*F. F. Marbury and Joshua M. Van Cott*, for appellant.

*John E. Burrill*, for respondents.

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FANCHER, J. The case made by the complainant may be briefly stated. The allegations are substantially these: 1. That the firm of Kenyon Cox & Co. (composed of Kenyon Cox, Horace Manuel, Wm. M. Hutchison and Daniel Drew) and Azariah Boody (who is the plaintiff), Milton Cortwright, Abraham B. Baylis, Stephen H. Allen, John M. Hutchison, Sidney Dillon and John S. Casement, entered into an agreement, in December, 1871, to be interested, in certain agreed propositions, in the purchase, sale and ultimate division of seventy-one thousand shares of the common stock of the Toledo, Wabash & Western Railway Co., and to share in the profit and loss in like proportions. Managers named were to buy and carry the stock until November 1, 1872. 2. That the title to said stock should be taken by four managers, viz.: Daniel Drew, Milton Cortwright, Abraham B. Baylis and Kenyon Cox, who should buy, sell and manage the same till November, 1872; and that the managers might increase the number of shares by buying and selling "puts." 3. That the proportions in which said parties should be interested in said stock were as follows:

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|------------------------|----------------|
| Azariah Boody.....     | 12,500 shares. |
| Daniel Drew.....       | 30,000 shares. |
| Milton Cortwright..... | 7,500 shares.  |
| Kenyon Cox & Co.....   | 5,000 shares.  |
| Stephen H. Allen.....  | 5,000 shares.  |
| John M. Hutchison..... | 5,000 shares.  |
| Abraham B. Baylis..... | 2,000 shares.  |
| Sidney Dillon.....     | 2,000 shares.  |
| John S. Casement.....  | 2,000 shares.  |

4. That each party should furnish to the managers the money and securities required to buy and carry his agreed proportion of the stock, or be subject to sale and forfeiture. And that the managers might employ brokers to buy and sell stock, and might sell privileges to put and call stock. 5. That the managers should not deal in said Toledo, Wabash & Western railway stock on their individual account. 6. That the managers should keep accounts of all the transactions. 7. That the transactions should be closed November 1, 1872, and the respective parties should then take from the managers their ratable proportion of the shares on hand, paying to the managers their ratable proportion of the cost, and bearing their

ratable proportion of any losses that might result. 8. That on the 1st November, 1872, the managers represented that 88,500 shares were on hand; that they had cost \$6,767,619.89; that the plaintiff's proportion of the shares was 15,600 shares, and his proportion of the cost was \$1,192,936.68; that thereupon said managers demanded that the plaintiff should take up such 15,600 shares, and should pay therefor such last-mentioned sum, and as he is informed and believes, said managers made similar demands upon others of the subscribers to said contract, that they should take up their proportion of said shares on hand, and pay their proportion of the cost price, as above stated. 9. That the managers violated their agreement not to deal with the stock on their individual account, but had dealt therein, and "turned in" their stock to the account of the associates. 10. That the managers had improperly managed the trust, and made improper charges to the cost of carrying the stock; that they have not properly accounted; that, in adjusting with the plaintiff, they had put on him some of their individual shares, as a part of the stock belonging to the associates, and that upon a proper accounting between the managers and associates, and between the associates themselves, "there will be found due to the plaintiff a large sum of money" — without saying *from whom* — by implication from the managers. 11. That the plaintiff is entitled to an account *from the managers*. The complainant prays that the managers may account accordingly; "and that an account may be had and taken between the several subscribers to the said contract of December, 1871, of all the transactions had and conducted thereunder." That each subscriber may be decreed to pay to the others whatever may be found due, and the plaintiff offers to pay what he may be found to owe; and that plaintiff may have such other or further relief as to the court may seem proper.

It is apparent, from the complaint, that the plaintiff's right to an account is, upon the facts stated, a right against the managers alone. It depends upon the stipulations of the agreement, and the transactions of the managers. It does not depend upon the plaintiff's ignorance of the state of the general partnership account. If it did, that account, by the plaintiff's own showing, cannot be re-opened at so late a day, except for sufficient cause stated as against all the associates. It must have been adjusted between the managers and the other associates, when the several rights to the shares of stock were ascertained, and the stock distributed on the



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1st of November, 1872. The plaintiff alleges that the managers made demands upon the several associates for their contributions, and states that he *took his shares of the stock*. That could not be, unless the shares of the other associates were ascertained. The plaintiff makes ground for the irresistible inference that the other associates took their shares of the stock as well as himself. The complaint does not state any facts sufficient to authorize the re-opening of that adjustment, except as to the managers. It alleges, that the plaintiff took his share of the stock, returning his securities; and, if, as it must be inferred, the other associates, on the 1st of November, 1872, also took from the managers their shares of stock, they must, severally, have made their respective adjustments with the managers. What ground of complaint has the plaintiff against any of the associates to re-open an adjustment of accounts thus deliberately made? The only grounds stated in the complaint are, that the managers violated their independent agreement not to deal in the stock on their individual account; that the managers had improperly managed the trust; had made improper charges to the cost of carrying the stock, and have not properly accounted. Let it be granted. It then follows, that the plaintiff may have his action against the managers, and, if he substantiate his allegations, may have redress to the amount he has been damnified. But it by no means follows that the plaintiff can elect, for the other associates, to undo the November settlement, or call on them for a further account, or compel them to submit to the plaintiff's desire for a new adjustment. The plaintiff must have assented to one adjustment when he took his share of stock. The other associates may prefer to keep their stock apportioned when the plaintiff took his share.

Before they could be induced to come into the new position, where the plaintiff seeks to place them, they might wish to consider whether they had better surrender what they received in the November settlement, and claim a new deal, or whether their interests are best subserved by standing upon the settlement. Certainly they have the right to adhere to the settlement, if they wish to do so; and the plaintiff has no right to volunteer, as their champion, to break it up. He may act for himself, but not for them, unless they consent, which they have not done.

The plaintiff, as it appears from the complaint, is dissatisfied with the adjustment made between the managers and the other

associates. He has set forth nothing that would induce the court to set aside the adjustment as to any of the associates, except the managers. The plaintiff retains all the stock he received. He does not offer to return, or allege his ability to return, any part of it. He does not allege that any other associate is dissatisfied, nor that any of them, but the managers, had any participation in or suspicion of any act or omission of the managers, of which the plaintiff complains. The plaintiff should be left to make out his case against the managers, if he can. But, before he can have all the associates summoned to respond to his actions, he must allege some cause of action against them. His complaint, as it now stands, alleges no cause of action against any of the defendants, except the managers. He states, that "*although he has taken up his stock, and redeemed the securities deposited by him with said managers, he has been unable to obtain from them a statement of the transactions conducted by them under and in pursuance of said contract.*" If the plaintiff has taken his shares of the stock, he has had all the advantage of the same. He may have sold it and received the proceeds. He does not offer to return the stock nor the proceeds of it; but avails himself of the benefit of the agreement to the extent of recovering all his share of the stock. He is not in a position to call any of the associates to account, except the managers, and the complaint is not sufficient, in my judgment, to enable him to do so, as against the other associates.

The only portion of the complaint relied upon by the plaintiff in the particular which calls for an account from the associates other than the managers, is the following: "And the plaintiff further alleges that the managers have not accounted, in respect to the transactions covered by the agreement of December 22, 1871, and on information and belief, that the accounts between the several associates in respect thereto are unadjusted and unsettled, and that, if said accounts were adjusted and settled between the managers and the associates, and between the several associates as between themselves, there will be found to be due to this plaintiff a large amount of money."

But this paragraph of the complaint, in connection with all other averments therein, and the prayer thereof make out no more than a cause of action against the managers. It is "as to the transactions covered by the agreement" in respect of which the plaintiff, on information and belief, alleges the accounts between the several associates

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are unadjusted and unsettled. Yet those transactions so far as to apportion the stock were assented to by the plaintiff. None of the associates, except the plaintiff, may complain of the adjustment of those "transactions." If they received their portion of stock, when they were entitled to it, in November, 1872, they may be satisfied. If any sum be found due the plaintiff, as claimed by the complaint, it is not averred that it will be due from any but the managers. Nor are any facts alleged from which it would result that any one is liable to the plaintiff, except the managers.

I think the judgment should be reversed with costs; and the demurrer sustained, with liberty to the plaintiff to amend, on payment of costs.

BRADY, J., concurred.

INGRAHAM, P. J., dissenting. The complaint in this case set out an agreement made between all the parties to this action, by which it was agreed to engage in the purchase of stock to a fixed amount, and in which agreement each party undertook to be responsible for a specific number of shares. A committee of four was named, who were to be managers of the stock, with certain powers conferred on them thereby.

It also avers the purchase of stocks, the payment by the plaintiff of the moneys for which he was responsible, and that the managers have violated the terms of the agreement on their part, and refuse to give the plaintiff any account of the transactions referred to, and he asks for such accounting.

The complaint concludes with a prayer for a general accounting among all the defendants, and a decree for contribution from those who are found to be indebted.

There can be no doubt but that the plaintiff could state a good cause of action against the four managers, if they were the sole defendants. If they have stock that plaintiff has paid for, and they will neither give him the stock nor render an account, equity will compel one or both remedies.

But the complaint does not claim any damages from the managers as distinct from the other associates. It shows that these managers, who were also associates, and selected to take the management of carrying out the contract for all the associates, have not properly discharged their duties, but alleges they bought and sold large

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amounts of stock, borrowed large sums of money, and paid large amounts of commissions, etc., and also alleges that such payments were unnecessary.

No claim is made against the managers, except for an account of their transactions for the associates. The whole object of the complaint appears to be an accounting between the parties or associates generally, including, of course, the accounting of the managers, without which the general accounting could not take place, and also a decree for contribution between the respective partners, in order to carry out the terms of the original agreement.

The whole complaint contains but one cause of action, and is consistent with the avowed object, viz., a final accounting and settlement between all the associates. As such it is not bad, on demurrer. It may contain some allegations that are irrelevant or immaterial, which might be stricken out on motion, but the insertion of such matters is not a good ground for demurrer.

It was said that all the associates should have been made plaintiffs, unless they refused. That would be so, if the object was to recover from the managers for the benefit of the partnership, but is not necessary where the sole object is to wind up the business and have a final settlement between them. In such a case any one of the associates may bring the action. The order appealed from should be affirmed.

*Order reversed.*

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PEOPLE, appellants, v. MALLOBY *et al.*

*Statute construction — New York city — department of docks, — power of, as to piers and wharves.*

The acts of the legislature passed in 1870 (chaps. 137, § 99 ; 383, § 32, etc.), and 1871 (chap. 574, § 6), providing that the department of docks in the city of New York shall have exclusive charge and control of the wharves, piers, bulkheads and structures thereon, etc., conferred upon said department only the authority which had been conferred previously upon the corporation and its officers connected therewith, and others in relation thereto, and does not authorize such board to allow such use of the piers as to exclude the public from their enjoyment of it as a highway or public street. The commissioners of the department of docks issued a permit to defendants allowing them to erect on pier 20, E. R., a shed for their private use. *Held*, that such permit was not authorized by law, and an injunction would issue to restrain the erection.

## People v. Mallory.

THIS action was commenced by the attorney-general for a perpetual injunction, restraining the defendants, Charles H. Mallory & Co., from erecting a shed over pier No. 20, East river, under a permit from the dock department of which the following is a copy :

|   |               |   |   |                      |   |
|---|---------------|---|---|----------------------|---|
| { | SEAL.         | } | “ | CITY OF NEW YORK,    | ” |
| { | E   c. 1,360. | } | “ | DEPARTMENT OF DOCKS, | ” |
|   |               |   |   | 346 & 348 Broadway.  |   |
|   |               |   | “ | NEW YORK,            | ” |
|   |               |   |   | Aug. 19, 1873.       |   |

“We, the undersigned, Commissioners of the Department of Docks, hereby PERMIT C. H. Mallory & Co., during the pleasure of the Board, and in conformity with its rules and regulations, to *erect*, on *Pier 20, E. R.*, a *shed* for the protection of freight, in accordance with *resolution* adopted at meeting of the *Board of Docks*, held *July 3d*, 1873. The dimensions of said *shed* being as follows: 400 feet or more long, 39 feet wide and 18 to 19 feet high.

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|---|----------------------|---|
| “ | JACOB A. WESTERVELT, | ” |
| “ | WM. GARDNER,         | ” |
| “ | W. BUDD,             | ” |

On the complaint and accompanying affidavit a preliminary injunction was granted by Judge Fancher, and an order requiring the defendants to show cause why it should not be continued.

The motion to continue the injunction was argued before Judge INGRAHAM, and an order made by him, September 22d, 1873, denying the motion and dissolving the injunction.

The concluding paragraph of Judge INGRAHAM's opinion was as follows:

“While the above views render it proper to dissolve the injunction, I think proper to add that, if the plaintiff proposes an appeal to the general term, it would not be advisable to proceed with the erection of these sheds until such appeal is decided. That court will very soon be in session, and the case then heard.”

C. H. Mallory & Co. proceeded to cover the pier with a shed, pursuant to the permit, and completed the work shortly after the dissolution of the injunction.

An appeal was taken, on behalf of the People, from the order dissolving the injunction to the general term.

*Wm. Allen Butler*, for appellants.

*Stephen P. Nash*, for respondents.

BRADY, J. The injunction granted in this case was dissolved by Presiding Justice INGRAHAM, upon a construction of the statute passed in 1871 (chap. 574), by which he thought the department of docks was invested with power to permit the erection of such a structure as the defendants in this case desired to create. He concedes that prior to that statute, amending, as it did, one passed in 1870 (chap. 137), there was no authority for such erections, the courts having pronounced against them, and the legislature having expressly prohibited their construction.

The question presented *in limine*, therefore, is whether this view of the statute of 1871 must be sustained. The acts of the legislature in reference to wharves and piers have, either directly or impliedly, prohibited incumbrances upon them. See Colonial Statute, January, 1770 (Van Schaack, 563); Act of 1784 (Jones & Varick, 125, 126), (which is substantially a re-enactment of the colonial statute); Act of 1791, March 10 (2 Greenl. 354); Revised Laws, 1813, chap. 86, §§ 227, 233, 234, 235, Act of 1857 (chap. 367); Act of 1858 (chap. 226). All these are expressions of the legislative intent, that the wharves and piers should not be incumbered, the design being to give to and preserve for them the character of highways—to make them part of the public streets. The act of 1813, § 227, as stated by Justice INGRAHAM, provided that no building, of any kind or description whatsoever, other than piers and bridges, should at any time thereafter be erected upon the streets or wharves, or between them and the river to which they should adjoin and front, and the act of 1858 empowered the commissioners of pilots to direct the removal of all structures affixed to the wharves. These acts were in force at the time of the passage of the acts of 1870 and 1871, and the court below was clearly right, therefore, in declaring that they had not been repealed, and that, unless the act of 1871 gave the power to permit incumbrances, it did not exist.

The learned justice in the court below placed his decision on this subject upon the existing statutes referred to, and the judgments of the court of last resort establishing the proposition that a wharf was a public street or highway. *Taylor v. Atlantic Ins. Co.*, 37 N. Y. 275. And that such a structure as the one contemplated was an incumbrance and unauthorized. *Commissioners of Pilots v. Clark*, 33 N. Y. 251. In consideration of the question stated, therefore, we start with the conclusion that when the acts of 1870 and 1871 were passed, there was no authority residing anywhere having the

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power to permit such an erection, the legislature and the courts of law having pronounced against their legality. What, therefore, was the design of the acts of 1870 and 1871? What did the legislature intend to accomplish? It is not very difficult to answer this question.

The object was to place under the control of a department specially created therefor the construction and regulation of the wharves, piers and slips of this city, to the same extent that such control had been given to the corporation — in other words, to transfer to it the powers possessed by the corporation, its officers and others, and such powers only.

There is not in the provisions of the act of 1871 any thing which, properly interpreted, confers upon the department any other or larger authority. The statute of 1871, amendatory of the act of 1870, upon which this appeal depends, provides that the department of docks shall have exclusive charge and control of all the wharves, piers, bulkheads and *structures* thereon, and of the appurtenances, easements, uses, reversions and rights belonging thereto, which were owned or possessed by the corporation, or which it might acquire.

The language, as remarked by the court below, is very comprehensive; but it is only so for the gift of the powers really conferred, and which, as already suggested, are those which the corporation formerly possessed.

The conclusion of the section (2) provides, and this is a key to the extent of the act, "The duties and powers heretofore performed and exercised by any officer, department or bureau of said corporation, in and about all or any part of said property, are hereby conveyed to and vested exclusively in the said department."

The position assumed by the court below is, that the control of the piers and bulkheads, with the structures thereon, and the authority to repair, build and rebuild such property, was amply sufficient, not only to cover the wharves where structures were then erected, but to empower the department to grant permission to build others of a similar character, and that the legislature intended to invest the department with discretionary power thereto.

The word "structures" seems to have had a controlling influence; but it is submitted with great respect that the act related only to legal structures, and to no other.

It cannot be said that the legislature intended, by the mere use of a word, in proper connection with a subject expressed and legis-

lated upon, to legalize what was prohibited, and against which the courts had pronounced their judgments. The use of that word implies equally the power to remove them, which had been conferred upon the commissioners of pilots by the act of 1858, *supra*, and this view is in harmony with the design of the legislature to vest in the department all the powers theretofore conferred, in reference to the construction, control and regulation of wharves, piers and slips. The legislature were acting upon the subject of wharves, piers and slips, with the design of centralizing the powers in reference to them, and must be supposed to have done so with regard to existing statutes and laws otherwise declared, intending to embrace, for that purpose, all matters legally within the legitimate sphere of the subject, and necessary to establish the jurisdiction. The use of the word mentioned cannot, without doing violence to established principles, be regarded as a repeal of the existing acts of the legislature, or as legislative declaration that the law administered by the court of last resort was to be changed, and yet to give it the significance it has received, such a result must follow.

It is well settled that repeals of acts of the legislature by implication are not favored, and not allowed, save when their repugnancy and inconsistency are plain and unavoidable.

The earlier statute remains in force, if not repugnant or inconsistent, unless the latter takes some notice of the former, plainly indicating an intention to abrogate it. *People v. Deming*, 1 Hilt. 271; *Bowen v. Lease*, 5 Hill, 225. All acts *in pari materia* should be taken together as if one law. *People v. Deming*, and cases cited.

These acts may remain and are not inconsistent. The department of docks may exercise power over structures on the piers legally existing, if any, when the act was passed, such, for example, as suitable derricks, authorized by the act of 1867, chap. 256, for unloading canal-boats and barges, and over those not legal until their removal is demanded or required by virtue of the act of 1858, or upon the ground that they are incumbrances and subject to removal. It has been said, and justly, that a construction which repeals another statute should be very clear, when the repeal is of a part of a statute and seriously mars the harmony of a system. *Hayes v. Symonds*, 9 Barb. 260. And the same remark applies where the alleged repeal is one of several statutes relating to the same subject, and seriously affects the whole system evolved. It is also a principle in the interpretation of a statute that it should not be



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construed to work a mischief, *e. g.*, curtailing a right of way of a navigable river, or interfering with a highway unless required by words of the most explicit and unequivocal import. *Sprague v. Birdsall*, 2 Cow. 419; *People v. Lambier*, 5 Denio 9. And so in this case, the mischief of allowing a department a discretion to incumber a public highway or street should not be sanctioned unless required by express words.

The exclusive use of a pier or wharf given to any particular class of vessels must be understood to be for the purposes of navigation or commerce only, and subject to the right of the public to the use of the surface as a public street or highway. The exclusive use, assuming the power to grant it, does not necessarily confer the absolute control or the pier for a particular purpose.

It has been held that the common council cannot contract away its legislative power. It can make no contract which restricts legislative authority over the particular subject embraced in the contract. If, therefore, a grant or lease were made by the common council, assuming them to be properly authorized to do so, of the exclusive use of a pier for the purposes of commerce, it would mean such use only and not necessarily grant or convey such absolute power or authority over the pier as to exclude the public in their enjoyment of it as a highway or public street.

It was said on the argument that the use of the pier for the defendants' vessels was a devotion of it to commerce, and, therefore, to a public use and for the public convenience and benefit.

To this it may be said, in the language of Chief Justice DENIO, in *Commissioners of Pilots v. Clark*, *supra*, "The language and obvious policy of the statute is that these piers and bulkheads should be kept clear of incumbrances, and it will not answer for parties permanently to engross portions of their area, and then ask a jury to speculate upon the degree of inconvenience which the public would suffer, and whether it was not fairly balanced by the advantage of the structure which constituted the incumbrance." In addition to these observations it may be said with great force, that as long as the wharfs are held to be parts of the public streets or highways they must be used accordingly, and therefore, with reference to well-established rights, subject only to such difference as the ordinary incidents of commerce may render necessary and justify.

Having arrived at these conclusions, it is not necessary to con-  
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sider whether the legislature, by virtue of an inherent power over the navigable waters of the State, may grant authority to incumber the public highway in the manner designed by the defendants. It is not necessary, because it seems that they have not delegated any such authority, the construction adopted of the act of 1871 being that it conferred upon the department of docks only the authority in reference to and power over the wharves, piers and slips, which had been conferred by acts of the legislature or by charter upon the corporation, and its officers connected therewith, and others in relation thereto, and that none of them contained the general power to erect or permit the erection of an incumbrance upon any wharf or pier such as contemplated by the defendant. The order made at special term should therefore be reversed.

*Order reversed.*

# THIRD DEPARTMENT.

GENERAL TERM, NOVEMBER, 1873.

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CITY OF OGDENSBURG v. LOVEJOY *et al.*, appellants.

*Demurrer — insufficient defense — adverse user — nuisance.*

Plaintiff brought action for breach of a city ordinance and set forth that defendant, in violation of such ordinance, did "cast and deposit in O. river, which forms one of the harbors in said city, and in a raceway leading from defendants' mill into said river, the same being one of the water channels of said city, sawdust, etc., which had the effect to fill up and obstruct the water channels and harbors of said city, etc. Defendants set up in answer, among other things, that the raceway is not a part of the O. river, nor a public highway, nor the property of the city, but an artificial channel belonging to defendants and used by them for upward of twenty years to float sawdust, etc.

*Held*, that this did not meet the charge that defendants cast and deposited sawdust, etc., in the O. river, which filled up and obstructed the water channels, etc., and was an insufficient defense, and bad on demurrer. Defendants had no right to so use their raceway as to fill up and obstruct the water channels of the city, and the legislature had a right to make provision to prevent the abuse of defendants' right of using their raceway by prescribing the mode and manner of using it.

*Held*, also, that filling up the channels and harbors was a public nuisance which no length of time would legalize.

APPEAL from an order sustaining a demurrer to the answer. The facts sufficiently appear in the opinion.

*Vary & Stone*, for appellants.

*Meyers & Morris*, for respondent.

PARKER, J. This action is brought to recover a penalty for a breach of an ordinance of the common council of the city of Ogdensburg, which is as follows: "No person shall cast or deposit, or suffer or procure to be cast or deposited in the Oswegatchie river, or

in any canal, raceway or pond leading into said river, in this city, any sawdust, shavings, chips, tan-bark, earth or refuse matter from any saw-mill, machine shop, tannery, or shop or manufactory of any kind, under the penalty of fifty dollars for each offense."

The complaint, after setting forth the fact that the plaintiff is a municipal corporation, incorporated and organized under and by virtue of an act of the legislature, etc., and that pursuant to section 21 of said act, as amended by section 3 of an act entitled, etc., the board of common council of said city, duly made and adopted the ordinance which is above set forth, proceeds to allege the violation thereof by defendants, as follows: "and the plaintiff further shows, that the defendants afterward, to wit, on or about the 1st day of September, 1871, in said city, did, contrary to and in violation of the ordinance aforesaid, cast and deposit, and did procure and cause to be cast and deposited in the Oswegatchie river, which forms one of the harbors in said city, and in the raceway leading from defendants' mill or shop, into said river, the same being one of the water channels of said city, certain sawdust, shavings, chips, bark and other refuse matter from his mill or shop aforesaid, which had the effect to fill up and obstruct, and does fill up and obstruct, the water channels and harbors of said city, whereby," etc.

The defendants answered the complaint by,

*First.* An admission of the fact that they did, at the time stated in the complaint, deposit sawdust in their raceway leading from their mill to the Oswegatchie river, and without denying any fact set forth in the complaint, and by alleging,

*Second.* That the defendants, and those under whom they claim, have been in the quiet and peaceable possession of the premises whereon the several acts complained of occurred for more than fifty years, preceding the commencement of this action, and have exercised full control and authority over said premises to the exclusion of all others.

*Third.* That the said raceway is not a part of the Oswegatchie river, nor a public highway, nor the property of the city, but is an artificial channel, belonging to defendants and others, and has been used by them for upward of twenty years to float sawdust, etc., from their mill, and that no compensation has been paid them, or their grantees, for such easement or their relinquishment thereof.

*Fourth.* That such raceway discharges its waters into the harbors of the Oswegatchie river, which are connected with and are part of

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the navigable waters of the St. Lawrence river, and the United States have exclusive jurisdiction and control over them.

*Fifth.* That the State of New York had and has no authority to pass said act, under which the ordinance was passed, without providing for awarding compensation to defendants.

To the second, third, fourth and fifth defenses, and the matters therein set forth, respectively, the plaintiff demurred on the ground that they do not, nor does either of them, constitute a defense or counter-claim.

In the case of *City of Ogdensburg v. Lyons*, which was an action for a similar violation of the same ordinance, when it was before us at a former term, we examined and decided all the questions raised by this demurrer, except that raised by the demurrer to the third defense.

This defense viewed as covering, both the claim of property in the defendants, in the raceway in which they deposited sawdust, and the claim of an adverse user of the race for more than twenty years does not fully meet the case, nor, so far as it does meet it, can it be sustained.

It does not meet and cover the allegation in the complaint, that defendants did cast and deposit, and did procure, and cause to be cast and deposited in the *Oswegatchie river*, which forms one of the harbors in said city, certain sawdust, etc., which does fill up and obstruct the water channels and harbors of said city, but is confined in its allegations to the raceway leading from defendants' mill to the said river. It is therefore an insufficient defense, and bad on demurrer.

But so far as it meets the complaint by its allegations in respect to the race, it is also in law insufficient.

As to the question of property in the race, that fact is no answer to the other admitted fact, that defendants deposited sawdust in their race leading to the Oswegatchie river, which had the effect to fill up and obstruct, and did fill up and obstruct the water channels and harbors of the city. The maxim, *sic utere tuo, ut alienum non laedas*, applies.

Although "a provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent, \* \* \* it is still to be understood that the lawgiver has a right to prescribe the mode and manner of using it so far as may be necessary to pre-

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vent the abuse of the right, to the injury or annoyance of others, or the public." 2 Kent's Com. (1st ed.) 275, 276.

As to the question of an adverse user for twenty years, such defense is not applicable to such a case as this. As against the right of the legislature, or the common council, under its authority, to make provision for preventing the filling up of the public water channels and harbors, the fact that an owner of land adjacent to such channels or harbors has, for twenty years or more, done acts upon his own land, the effect of which was to fill up such channels and harbors, is clearly no defense. The doing of such acts amounts to a public nuisance. The harbors are for the public use, and the obstructing and filling them up, it cannot be doubted, constitutes a common or public nuisance.

"No length of time will legalize a nuisance. *Nullum tempus occurrit respublicae*, applies with unmitigated force against a public nuisance." *Dygert v. Schenck*, 23 Wend. 448.

Such being our conclusion as to the question raised by the *third* defense, in both its branches, and the points of the other defenses being made by our former decision, *res adjudicata*, which we cannot here re-examine, it results that we must affirm the judgment appealed from, with costs.

MILLER, P. J., and P. POTTER, J., concurred.

*Judgment affirmed.*

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MILLER, appellant, v. LINK *et al.*

*Acknowledgment — insufficient certificate.*

The acknowledgment of a deed was this: "Personally appeared before me, Robert S. Livingston, signer and sealer of the foregoing instrument, and acknowledged the same to be his free act and deed before me." *Held*, insufficient.

The acknowledgment of a deed must show, that the party acknowledging the instrument was known, or proved, to the officer to be the party named in and who had executed the same.

APPEAL by the plaintiff from a judgment for the defendants entered upon a verdict. The action originated in a justice's court;

the defendant pleaded title; it was dismissed and begun in the supreme court. The facts appear in the opinion.

*John Gaul, Jr.*, for appellant.

*J. C. Newkirk*, for respondents, upon the question discussed in the opinion, cited *Jackson v. Gumaer*, 2 Cow. 552; *Troup v. Haighter*, Hopk. 239; *Duval v. Cowenhoven*, 4 W. R. 561; *Thurman v. Cameron*, 24 id. 87; *Hunt v. Johnson*, 19 N. Y. 294.

P. POTTER, J. One question which seems to be fatal to sustaining the judgment in this action, is the ruling of the judge in the admission in evidence on the part of the defendant of a deed from Robert S. Livingston to him, covering the *locus in quo*. This evidence was objected to by the plaintiff on several grounds, among which was, that it was not duly acknowledged. There was no other evidence of the execution of the deed, than the certificate of acknowledgment, which was in the following form:

STATE OF NEW YORK, }  
CITY AND COUNTY OF NEW YORK. } ss.:

Personally appeared before me, Robert S. Livingston, signer and sealer of the foregoing instrument, and acknowledged the same to be his free act and deed before me.

NEW YORK, *March 28*, 1865.

J. NELSON LUCKY,  
*Notary Public.*

This certificate fails of being a compliance with the plain requirements of the statute. By 1 R. S. 758, § 9, it is enacted: "No acknowledgment of any conveyance having been executed, shall be taken by any officer, unless the officer taking the same *shall know*, or have satisfactory evidence that the person making such acknowledgment, is the individual described in and who executed such conveyance."

By 1 R. S. 759, § 15, it is enacted: "Every officer who shall take the acknowledgment or proof of any conveyance, shall indorse a certificate thereof, signed by himself, on the conveyance, and in such certificate *shall set forth* the matters hereinbefore required to be done, *known* or proved, on such acknowledgment or proof," etc. Section 15 requires, among other things, that the officer who takes the

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acknowledgment, shall, *in his certificate*, set forth the matters required by § 9, to be *known* to him. One of *those* matters is, that the person making the acknowledgment is *known* to him to be the person described in and who executed the deed.

In this respect the certificate is *fatally* defective.

It does not certify that the party acknowledging the instrument was *known* to the notary to be the party named in and *who had executed* the same.

This he was absolutely bound to do. Otherwise the lands of citizens might be conveyed by strangers impersonating the true owners.

The whole object of the statute was to prohibit frauds by personating grantors, and rendering insecure titles obtained in that way. It might well be true as certified, that the signer and sealer of a deed, calling himself Robert S. Livingston, executed it, but the important part of the requirement is, that the officer should certify that he knew the grantor, or had satisfactory evidence of his being, in truth and in fact, the person he represented himself to be. None of the cases cited are so totally defective as this. The judgment should be reversed, and a new trial granted, costs to abide the event.

MILLER, P. J., and PARKER, J., concurred.

*Judgment reversed, and new trial granted.*

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TAYLOR, executor, etc., *et al.* v. DODD *et al.*, appellants.

*Will — construction of — “estate.”*

A will contained the following provision: “I give and bequeath to G. S. B. my stone store and \$10,000 in money *out of my estate*.” The testator’s personal property was insufficient to pay the legacy, but he left valuable real estate, more than sufficient for that purpose. By a clause in a codicil to the will, he directed his executors to sell as much of his *real estate* as in their discretion and judgment should be for the best interest of “my estate;” also, that certain of his “real estate” should not be sold until necessary for a final settlement of “my estate.” There was no residuary devise. *Held*, that by the term “my estate,” the testator intended all his property, both real and personal, and that, after exhausting the personal property, the remainder of the legacy should be paid from the real estate.



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APPEAL from a judgment entered upon the decision of a justice at special term, giving judicial construction to the provisions of a will and codicil.

The testator, Joshua H. Story, died in April, 1871, at Coopers-town, Otsego county, leaving a will and codicil which were duly admitted to probate by the surrogate of that county. The will contained about twenty-six clauses, besides a codicil containing two clauses. The testator was unmarried, leaving one brother, George Story, one of the executors and one of the plaintiffs, and three sisters, one of whom, Eliza M. Taylor, is also executrix and plaintiff, and Mary Bradford and Fanny T. Hall, who are defendants in the action, his only heirs at law. The other defendants are either legatees named in the will, or are the representatives of parties claiming interests in the estate. The testator died seized of real estate not specifically devised as such, of the value of \$173,808.66, which was subject to mortgages to the amount of \$48,845.86. He left also personal property including articles specifically bequeathed of the value of \$95,000, and was owing debts, exclusive of the mortgages, to about \$79,000. The expenses of administration have amounted to about \$12,000.

There were no mortgages upon the real estate which was specifically devised. There was a power of sale given in the codicil to the executors, to sell and convey a large portion of the real estate, under which power they had disposed of a considerable part of the real estate, and had received therefor, including rents, the sum of \$108,458.17. Of this amount they had paid on account of mortgage liens and interest upon all the mortgages, \$32,181.56. The real estate remaining unsold, and which they had the power to sell, was estimated to be worth \$65,000. Upon this there are mortgage liens of about \$16,000. From the avails of real estate sold and unapplied, and of sales of personal property exclusive of specific articles bequeathed, the executors have sufficient means in hand to pay and satisfy in full all the testator's debts, expenses of administration, and all the legacies; but not including the mortgage debts upon the real estate unsold. These facts are not materially, if at all, controverted. Upon these facts, and the provisions of the will and codicil the judge, upon the trial, found "no satisfactory evidence of an intent on the part of the testator to charge his real estate or any part of it with the payment of legacies," and held that the real estate was not so charged. He also held as legal conclusions,

*First.* That the pecuniary legacies given in and by said will and codicil are not, nor are any of them, chargeable upon, or to be paid from, the proceeds of the real estate of the testator, in any event whatever."

*Second.* That "the residuum of said real estate of which said testator died seized, not devised by said will or codicil, descends to the heirs at law of said testator, to wit: George Story, Eliza M. Taylor, Mary Bradford, and Fanny Hall, as tenants in common in fee, subject to the power of sale given to the executors by the codicil of said will." Exceptions were duly taken by the parties interested, and appeal taken to this court from said judgment. Such portions of the said will and codicil as are material to the examination and review of the case will appear in the opinion.

*E. Countryman*, for appellants.

*E. M. Harris* and *H. Sturgis*, for respondents.

P. POTTER, J. In the construction of wills there are a few well-established, uniform rules which apply to all cases, and which are cited in all cases, whatever may be the question at issue, to wit: 1. "That the intentions of the testator shall always prevail if they are consistent with each other, and conformable to the principles of law." 2. "That the language used shall receive its ordinary interpretation, except where some other interpretation is necessarily or clearly indicated." 3. "Where words are equivocal that construction shall be given which will preserve consistency, in preference to one which would create inconsistency." 4. "If it be possible some effect shall be given to each distinct provision of a will, and every word and sentence shall be held to have a meaning and express some intent, rather than that they should be annihilated."

Beyond these general rules it is difficult for courts to add rules of construction, applicable alike to all cases. The diversity in the form and language of wills is only equaled by the diversity in the character of minds of those who assume the duty and responsibility of preparing the instruments. Comparatively few are drawn by men of professional skill. In cases where this is manifest from the language of the instrument itself, it is the duty of courts, so far as the rules of law will permit, to give this circumstance consideration, and to give effect to the intention of the testator as deduced from

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the language of the will, read in the light of the circumstances which surround the testator at the time of its execution, the age and condition of the testator as well as that of his relatives and friends who have surrounded him in life, and from whom he may have received kind attentions, and of those of his blood, or who may be dependent upon his bounty; the amount and condition of his property, of his debts and liabilities, and the character of his habits and associations. All these are circumstances which may be looked at in order to give force or construction to defective or inartificial language employed in the will, and in order to ascertain the true intent of the testator. It is apparent from the reading of the will and codicil in question that they were not drawn by one professing professional skill, familiar with, or possessing knowledge of, the import of technical words. It is clearly apparent from the fact of making a will that the testator did not intend to die intestate, and leave all his estate to a legal inheritance.

It is beyond all question that the testator did intend to give his *estate* to the several legatees and devisees named in his will, and codicil in the amounts and in the articles therein respectively specified. This *intent*, being expressed in clear and unequivocal language, ought not to be defeated by judicial construction without an imperative necessity arising from some other later or express provision of the will coming in direct conflict with or repugnant to it. The estate of the testator was abundantly sufficient to meet and satisfy all these express bequests. He is to be presumed to have intended that all the express provisions of his will should be carried into effect. He is to be presumed to have made this disposition of his estate in view of the sufficiency of the estate to meet the bequests, and in view of the surrounding circumstances existing at the time of making it. He is not to be presumed ignorant of the amount of his personal estate — of the amount of his indebtedness at the time — that his personal estate would be insufficient to meet those debts, that his personal estate must be first applied to the payment of his debts, and to meet the expenses of administration.

It is under such circumstances and with such knowledge that this will and codicil was made, and from which construction is to be given.

The first clause of this will is in the following words: "*First, I give and bequeath to George S. Bradford, my stone store on the south side of Main street, in the village of Cooperstown, and ten thousand dollars (\$10,000) in money out of my estate.*"

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The construction to be given to this clause of the will is materially controlling as to many other provisions of the will and codicil. The inappropriate use of the term "*bequeath*," as applied to real estate, cannot, of course, affect the intention of the testator, it is a good specific devise of real estate. This word "*bequeath*" is connected by the conjunction "*and*" to the gift of \$10,000, and by grammatical reading makes both the devise of real estate and the bequest of money to come "out of my estate." But the important question to be determined here is, what did the testator mean by the words "*out of my estate*?" Did he mean his whole estate, real and personal? Applying the rules of construction above laid down, and reading the language of this clause in the light of the circumstances surrounding the testator at the time, I am of opinion that he intended that George S. Bradford should have out of his whole estate as well the \$10,000 as the stone store. Both gifts are contained in one connected sentence, and he has estate enough to satisfy both. There is nothing in any other clause of this will from which it may be implied that he did not by the word "*estate*" mean his whole estate, real and personal, but there is much in it from which to infer that he did so intend. In common parlance a man's estate means his whole estate. This word is to receive its ordinary interpretation. In giving it this interpretation, effect can be given to every provision of the will, and every devise and legacy satisfied. In the case of *Bridgewater v. Bolton*, 1 Salk. 237, the court, per HOLT, J., in giving construction to the language of a will, among other things, said: "The word *estate* is *genus generalissimum*, and includes all things real and personal." And again, "In a will the testator is not tied up to form; it is enough that he expresses and signifies his meaning in any words." This case was cited with approbation in *Jackson v. Robins*, in the court of errors, 16 Johns. 587.

In *Archer v. Doneale*, 1 Pet. 588, Chief Justice MARSHALL said that "the word '*estate*' is sufficiently comprehensive to embrace property of every description, and will charge lands with debts if used with other words which indicate an intention to charge them. This is a proposition that cannot be controverted." In *City of Boston v. Inhabitants of Dedham*, 4 Metc. 178, construction was given to the word "*estate*" in a statute defining the gaining of a settlement, as follows: "Any person of twenty-one years of age, being a citizen of this, or of any of the United States, having an

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estate, the principal of which shall be set at £60, etc., shall thereby gain a settlement."

The court say, "the leading and most prominent objection taken by the defendants is, that the term '*estate*,' as used in the statute cited, means exclusively real estate, and that a valuation and assessment upon *personal property* do not bring the case within the statute." "This," say the court, "in our opinion, is too restricted a definition of the term '*estate*.' The term is of very broad and extensive application, and clearly comprehends personal as well as real estate." In *Lovacres v. Blight*, Cowp. 355-6, Lord MANSFIELD said, "In general, whenever there are words or expressions, either general or particular, or clauses in a will which the court can lay hold of to enlarge the estate of a devisee, they will do so to effectuate the intention. \* \* \* The question is always one of construction, and depends upon observations naturally arising out of the will itself." *Lambert's Lessee v. Paine*, 3 Cranch, 101. The case of *Roe v. Harvey*, 5 Burr. 2638-9, was an issue between devisee and heir upon the construction of the clause in a will, as follows: "All the rest and residue of my '*estate*.'" Lord MANSFIELD said, "the word '*estate*' carries every thing unless tied down by particular expressions." This case is also cited with approbation in court of errors. 16 Johns. 587; see, also, *Holdfast v. Marten*, 1 Durnf. & E. 411; *United States v. Crookshank*, 1 Edw. Ch. 239; *Havens v. Havens*, 1 Land's Ch. 334.

In view of the provisions of this will and codicil—of the conditions of the testator's estate,—of the presumption of his knowledge of the extent of his personal estate and of the extent of his debts which must necessarily exhaust the personal,—of his expressed intent to bequeath to many friends and relatives large sums in the aggregate which could only be satisfied from his *estate* using the term in its most comprehensive as well as its most natural and legal sense, and in giving effect to every provision of the will, I find no difficulty in holding that the testator intended that this legacy of \$10,000, as well as other legacies subsequently mentioned in the will and codicil, should be paid "out of his estate which, in his meaning and intent as well as in law, is to be held to mean his whole estate. This conclusion is not in conflict with that numerous class of cases in which it is held that the personal estate is the primary fund for the payment of legacies as it is first for the payment of debts, and that the real estate is not to be charged with

the payment of legacies unless the intention of the testator is expressly so declared, or that such intention is clearly to be implied from the terms and provisions of the will. The case at bar, it seems to me, is within both these exceptions. By proper legal construction, the words "out of my estate" are to be held to mean the whole estate of the testator and by necessary implication from other provisions of the will and the known insufficiency of the personal estate to satisfy the bequests and devises, such intent is also to be inferred. These inferences may be drawn from the following, among other provisions. By the second clause of the codicil he authorizes his executors to sell and convey such portions, parcels or lots of his *real estate* as in their discretion and judgment shall be for the best interest and advantage of "*my estate*." As he himself here distinguishes between his "*real estate*" and "*his estate*," and as the former may be sold to benefit the latter, we must give "*my estate*" in this clause, and the same words in the first clause of the will, the same interpretation. Then again in the same codicil, he expresses his will that certain of his "*real estate*" be not sold until certain contingencies happen, and among these contingencies is this, "until it shall be necessary for a final settlement and distribution of *my estate*," that is, he directs his "*real estate*" then to be sold to make up "*his estate*," for distribution and settlement.

This would be an absurd provision if his heirs at law were to take it when sold, but a very reasonable and sensible provision, if it was to be distributed to the devisees and thus settled. The delay which is directed in the codicil as to the sale of this portion of his real estate is in harmony with the time of payment of some of the legacies, the time for the payment of which was postponed, one of which was to be paid at the end of eight years "*out of my estate*." It appears to me, indeed, that all the provisions of this will and codicil distinctly evince an intent on the part of the testator, that "*his estate*," which is abundantly sufficient to that end, should pay the legacies directed thereby. In so interpreting the will, the whole letter as well as the spirit of the instrument is preserved, made effective and satisfied, and a large residuum is left to be divided among the heirs at law. The lands which will descend to them, by law, must bear the burden of the mortgages thereon, according to the maxim *transit terra cum onere*. 2 Pow. on Devises, 673-4. These mortgages and interest are not to be satisfied at the

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expense of legacies in the will, either specific or pecuniary. *Rider v. Wager*, 2 P. Wms. 335.

The interpretation given to this will and codicil at the special term (except as to two or three specific devises) nullifies these instruments, makes void the express bequests, and holds that notwithstanding the express declaration of intent to distribute a portion of his estate to his friends and relatives, to some of whom he acknowledges his obligations for kind services as the consideration, the gift is a nullity, and that the testator, notwithstanding the will, died intestate.

This does not appear to me to be the natural or legal view or to express the intent of the testator by the language "*out of my estate*," the testator blended his real and personal assets in his mind, into *his estate*, as one estate, his language was singular, "*my estate*," not estates; indeed he directed his real estate to be sold for the best interests of *my "estate"*, I think the court are bound to carry the testator's intent as we find it to be, into execution by judgment.

The result is that the judgment below must be reversed and judgment ordered, 1st, declaring that the pecuniary legacies given in and by said will and codicil be chargeable upon the real estate, after the payment of the testator's debts and expenses of administration from the personal and the proceeds of real estate in the hands of the executors, and directing the said executors to pay and satisfy the said bequests, according to the directions contained in said will and codicil; 2d, directing the articles of personal property specifically bequeathed in said will to be paid and delivered over to the persons named as legatees therein, according to the directions of the said will; 3d, to carry out the provisions of said will and codicil as to the case of the Miller farm, and as to investing \$7,000, the income of which is to be applied to the improvement of the cemetery lot as directed by the last clause of the will, and also as to investing \$5,000 for Ellen McNamee and for the payment of the principal as directed in the first clause of the codicil; 4th, that the residuum of the said estate, real and personal, after the payment of the testator's debts and the expenses of administration and costs, and the payment of the pecuniary legacies, and satisfying the specific devises of real estate, and the specific bequests of articles of personal property descend to the heirs at law of the said testator, to wit, George Story, Eliza M. Taylor, Mary Bradford and Fanny Hall as tenants in common; 5th, that the several parties to this

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action who appear by attorneys are entitled to costs and disbursements taxable to be paid out of the estate. If more than one attorney appears for parties representing the same interest, but one bill of costs and disbursement is to be allowed to be divided among the attorneys representing such interest.

MILLER, P. J., and PARKER, J., concurred.

*Judgment accordingly.*

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BICKNELL, appellant, v. BICKNELL.

*Will — undue influence — evidence.*

A testator left surviving him a widow and a son by a former marriage. By his will he gave all his property, amounting to \$5,330, to his widow, except a legacy of \$25 to his son, and one of like amount to the widow of a deceased son. It was shown that the testator was a man of strong will and decided character and determined to have his own way; that his wife and son were not on good terms, and she had, on some occasions, complained of her treatment by the son in the presence of testator, and had also declared her belief that the son was dishonest in his dealings with testator. It was also shown that the will was drawn under testator's directions, and his wife was not present at the time; that his mind was clear, and that he gave at the time satisfactory reasons for the disposition made of his property, viz.: That the son had more property than he himself had; that the deceased son's widow had friends that would take care of her; that he had no more property than he ought to leave to his wife; that his wife had been kind to him and prolonged his days, etc. It was shown, also, that testator had expressed himself as dissatisfied with the conduct of his son to himself and wife, and had, shortly before his death, stated such conduct as one of the reasons for the provisions of the will.

*Held*, that there was no evidence of undue influence on the part of the wife; that no inference of such influence could be drawn from the complaints made by her concerning the son's conduct; nor could such an inference be drawn in such a case as this, from the fact that the wife was the donee of the whole estate; and that the will was entitled to admission to probate.

APPEAL from decree of a surrogate, admitting a will to probate. The facts sufficiently appear in the opinion.

*Tappan & Erwin*, for appellant.

*Parker & McIntyre*, for respondents.



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PARKER, J. This is an appeal from the decree of the surrogate of the county of St. Lawrence, admitting to probate the will of Richmond Bicknell, deceased.

The will was executed December 2, 1870. The testator died April 28, 1871, at the age of about eighty years, leaving surviving him his widow, Keziah Bicknell, the respondent, and one son by a former marriage, the appellant. Three other children of testator, by such former marriage, had died before the death of testator, leaving no issue.

After the death of testator's first wife he married the said respondent, in the year 1855, with whom he had lived from that time to the time of his death, without issue.

By his will he gave to Sarah Bicknell, the widow of a deceased son, \$25, and to the appellant the same sum, and the residue of his property, both real and personal, to his widow, the respondent, and appointed her the executrix of his will.

His estate consisted of the homestead where he died, valued at \$2,500; a store worth \$600; a pasture lot worth \$480; and personal property of the value of \$1,750, in all \$5,330.

The will was presented to the surrogate by the respondent, for probate, on the 12th day of May, 1871. The proper citation was issued, returnable on the 29th day of May, 1871, upon which day the proponent appeared to prove the will, and the above-named appellant appeared to contest such probate. Testimony was then, and afterward, upon adjournments from time to time, taken, and, upon the 4th day of March, 1872, the surrogate made and entered his decree, admitting the will to probate.

From such decree this appeal is brought.

No question is made in respect to the formal execution of the will, nor as to the testamentary capacity of the testator; but it is claimed that the will was procured by the undue influence of the proponent.

After a careful reading of all the testimony I do not discover such proof of the fact, which the contestant sought thereby to establish, as seems to me sufficient to warrant a reversal of the decree. On the contrary, I am strongly impressed with the conviction that it is extremely improbable that the proponent did induce, or could have induced, the testator to dispose of his property in any way not originating with himself.

The testimony very clearly shows that the testator was, up to the

day of his death, a man of strong will and very decided character — seldom, if ever, giving up to another, and always determined to have his own way. In the language of the contestant's witness, John S. Thompson, "He was always a man of peculiar traits of disposition, and was regarded as a peculiar man. He was considered a pretty strong-willed and stubborn man." Another of contestant's witnesses, James W. Culver, said of him, "He was always a very strong-willed man, and determined to have his own way; he had singular notions; I always regarded him as a man who was conscientious and meant to do what was right, from his own stand-point.

\* \* \* I discovered no change except the natural wearing down of old age. The singularities I speak of have always existed as long as I knew him. \* \* \* The effect of the decay of his mental powers seemed to intensify his peculiarities." There is no testimony in conflict with that which goes to establish for him such a character, but the whole evidence tends strongly to confirm it, and lead the mind to the conclusion that he was not a man likely to be influenced in his opinion or his acts by others, but rather, one likely to adopt his course of action from reasons satisfactory to himself, regardless of the views or wishes of others.

That he acted in conformity to this trait of his character, in making the will in question, is also, I think, quite evident from the testimony.

It appears that he had made two wills previously—one some four or five years before and the other a year or two before. There is no distinct proof of the contents of those wills, but it seems that the second one, which is also spoken of as a codicil, was more favorable to his widow, the proponent, than the first, but less favorable to her than the one in question. It also seems that he had subsequently destroyed this second will or codicil. Between the making of the second will and the one in question, his son Richmond, Jr., had died, leaving a widow, but no issue. The widow is one of the respondents here.

It also appears from the evidence that the two sons of the testator, contestant and Richmond, Jr., were not pleased with their father's marriage with the proponent, and that between her and contestant particularly, there had not been, at any time, a very kindly feeling; and it is alleged by contestant, that she took pains to prejudice his father against him, with the object of inducing him to leave his property to her rather than to contestant. It is shown

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that she complained, from time to time, that contestant had always, since she came there, misused and abused her; that on one occasion she said, "she had always tried to treat them kindly, and told Mr. Bicknell not to mind what they did or said; but that she had become so disgusted with their abuse, or that Hosea had carried things to such an extent, that she should do so no longer, but should let him (deceased) see them in their true light. That Hosea would see that he had been fighting against himself, or working against his own interest in doing as he had."

She also said that "there had been a time when she did not expect Mr. Bicknell would provide for her any more than the law required, but that Mr. Bicknell did not feel as he did when he made his will, or before Richmond's death; and that it was right and lawful that she should try and see to it that she was provided for, else, if she should survive him and be left at Hosea's mercy, she would fare hard."

And that, on another occasion, she said "he (contestant) had treated her in every respect like a dog; that the time was coming when he would find there was one woman smart enough for him, and she would come out unscathed from all his abuse."

It is also shown that proponent at times, in testator's presence, spoke of contestant's dishonesty in his dealings with testator, and endeavored to prevent him from dealing at contestant's store, and that on one occasion testator did, at some inconvenience, go to another store, more distant from his residence, to purchase what he could as well have procured of contestant; also, that testator himself, on some occasions, declared contestant dishonest.

It appears also that proponent usually wrote decedent's letters and contracts, and transacted much of his business — attended him at home and when he went from home, and was generally the only occupant with him of his house. That she worked with him in the fields. That she knew the contents of the first will, and was dissatisfied with it, and was dissatisfied that the second one or codicil was destroyed. That she knew of the making of the will in question, having by decedent's direction written for the scrivener who drew it, to come and do so, though not present when it was drawn or executed, and that its contents were immediately afterward made known to her.

From all these facts and opportunities it is inferred by contestant that proponent did excite and awaken in the mind of testator, pre-

judices against contestant, whereby he was cut off by the will in question from any participation in testator's property, except the \$25 therein bequeathed to him.

If the testator had been a man of weak and irresolute character, or enfeebled by disease, and had been possessed of a large or considerable estate, which he had given to his widow to the exclusion of others having claims upon and need of his bounty, the circumstances relied upon by contestant, might, perhaps, have been sufficient to create a strong suspicion that the testator had been induced so to dispose of his property by undue influence brought to bear upon him by his wife.

But in this case the testator, as we have seen, was a man not likely to be influenced by others in the disposition of his property, and was not, when the will was made, enfeebled by sickness. Nor does it appear that whatever dissatisfaction he may have had with his son, the contestant, the same was excited by the proponent. The evidence shows that he had independent reasons for such dissatisfaction in the treatment of himself by contestant, and it sufficiently appears that the complaints of proponent that he had illtreated her were not groundless. The property of the testator was not large, the whole of it being, by no means, an unreasonable amount for the support of the widow; while the contestant, the only other person entitled to claim any part of it, was a well-to-do and prosperous man, having no family but his wife, with whom he had lived seventeen years without issue, and possessed of property, some of which he had received from his father, worth more than double the value of his father's estate.

The disposition of testator's property, as made by the will, seems a very reasonable and just one; such an one as would be expected under all the circumstances from a reasonable and just man. The reasons which the testator himself gave to the scrivener, who drew the will at the time when it was drawn, for directing it to be drawn as it was, seem to me just and satisfactory, and the testimony of the scrivener tends strongly to rebut the allegation that he was operated upon by prejudice, or any undue influence in the making of his will, or that he was in a condition to be so operated upon.

The witness testified as follows: "Mr. Bicknell and myself only were present when I drew the will; deceased gave me the directions as to how it should be drawn, and I drew it according to those directions; I remained there probably an hour or two; I had no other

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business but to draw the will; he gave me the directions and I drew it; deceased seemed to go a little lame; I supposed he was a little lame or infirm; as to clearness of mind, he appeared as he always had to me; was a person of very decided opinions; expressed himself very readily and intelligently; told me he wished to have his will drawn over again, and I drew it as he directed me to; I noticed nothing that seemed peculiar or unnatural in him. \* \* \*

During the interview he remarked that *Hosea, his son, was well enough off, and that Richmond's widow was well enough off, and had friends that would take care of her, if necessary; and that he had concluded to give his property mainly to his widow.* I had drawn two wills for deceased before this one. I think he produced one of these wills that day that was witnessed by Mr. and Mrs. Hemenway. Mrs. Bicknell did not see the will while I was there. She was not in the room. The doors of the room were shut while I was writing. I remember deceased going to shut the door, but I don't recollect his locking it," and on his cross-examination, he said, "at the last interview drawing the will, deceased said *that he had made up his mind to leave his property to his wife; that Hosea was better off and had more property than he had; that his property had been growing less, and expenses higher, and that he had no more property than he ought to leave to his wife.*" He also said to this witness, at the time when the will was drawn, that "his wife had been better than a doctor to him, and had prolonged his days [alluding to a sickness which he had about two years before] that she had given him medicine which had been of more consequence to him than the doctor's, and that she deserved his property."

To other witnesses he expressed his sense of his duty to give his property to his wife, in view of the fact that she would need it all, and that contestant would not need any of it, having already more than he, the testator, had, and living in expectancy of receiving more from an aunt.

It is true that the testator, shortly before his death, when under the influence of disease, gave to Hemenway, who was a subscribing witness to the will, another reason for cutting off contestant, which he states as follows:

"He said to me, 'I want you to tell Hosea, when the will is opened, if he asks any questions why the will is so and so, that I have willed him what I have in addition to what I have given him

before, and the reason why the will is as it is, is because of his conduct to me and my wife.' ”

If this reason, in fact, operated upon him when he made the will it by no means appears that it was a *prejudice* induced by the influence of proponent. As already remarked the evidence shows that testator had reason, or thought he had reason, to complain of contestant's conduct, in reference to himself as well as to his wife, and he had repeatedly expressed his dissatisfaction with his son on that account, and for causes of complaint which must have come under his own observation.

But in the face of his declaration at the time when the will was made, and at various other times, that he ought in justice to his wife, and in view of the fact that his son was well enough off, to give all he had to his wife, it is difficult to believe that the moving cause to such disposition of his property was in fact any other than he so declared, and what he said to Hemenway does not necessarily conflict with it. But for contestant's manifest want of proper feeling toward proponent, the testator might have been willing to trust his widow's support and comfort somewhat to the good offices of his son, which he was unwilling to do in view of his conduct referred to.

It is not improbable that the proponent did make known to him her views in regard to the propriety of his devoting his entire property to her support and maintenance in the event that she should survive him, and deprecate the being left in any respect subject to the good will or discretion of contestant, and very likely testator was influenced by her wishes in this respect. But I do not understand or infer from the whole case, that she used any secret or improper means to influence his mind against his son. Her complaints of contestant's treatment of her, as they do not appear to have been unreasonable, cannot be charged as unduly influencing the testator against him. Whatever she had to say against him, so far as appears, she said openly in the presence of others, manifestly under the influence of wounded feelings, and not from a desire to injure him in the estimation of testator—such is the impression I have received from the whole testimony in the case.

The will, in this case, is not unnatural or unreasonable, it is just and meritorious. This is not a case where the inference of undue influence can be drawn from the fact that proponent is the donee of the whole estate; such fact of undue influence is to be found, in

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such a case as this, not by showing opportunity and interest merely, but positive acts of the party charged. *Seguine v. Seguine*, 3 Keyes, 665; *Clapp v. Fullerton*, 34 N. Y. 190; *Gardiner v. Gardiner*, id. 155, 161, 162; *Tyler v. Gardiner*, 35 id. 559, 594, 595.

It is to be remembered that, even if the proponent did urge upon testator her claims to the whole property in preference to contestant, in view of her relations and services to testator, of her destitution, independently of his bounty, of the existing unpleasant relations between contestant and herself, and the unfitness and inhumanity of leaving her in any degree dependent upon him, and if testator was thereby induced to make the will as he did, this was not undue influence. These considerations the wife might properly urge upon her husband, and any influence which they exerted upon him was entirely legitimate. 1 Redf. on Wills, 530-534.

In *Seguine v. Seguine*, *supra*, Judge WRIGHT, in delivering the opinion of the court, said, "Undue influence must be an influence exercised by coercion, imposition or fraud. It must not be such as arises from the influence of gratitude, affection or esteem, but it must be the ascendancy of another will over that of the testator, whose faculties have been so impaired as to subject him to the controlling influence of force, imposition or fraud. Moreover, the exertion of the influence upon the very act must be proved, and it will not be inferred from opportunity and interest."

In regard to cases like the one at bar, the rule thus stated is, I think, in all respects accurate and applicable.

The evidence in this case comes far short of proving undue influence exerted by proponent upon the mind of the testator, under which the will in question was made.

I am of the opinion, therefore, that the decree of the surrogate, admitting it to probate, should be affirmed, without costs to either party.

MILLER, P. J., and POTTER, J., concurred.

*Decree affirmed.*

SECOND NATIONAL BANK OF WATKINS v. MILLER *et al.*

*Evidence — husband and wife — wife's separate estate — agency — declarations of agent.*

A husband obtained a loan upon notes made by his wife, and indorsed by him.

*Held*, that declarations made by the husband at the time he applied for the loan, that he was conducting the business for his wife, and at the time the loan was made, that he was her agent, were inadmissible to establish the fact of his agency, or that the loan was being made for the benefit of the wife's separate estate.

The fact that defendant was insolvent; that she had secured other notes of his by bond and mortgage; that he had charge of her separate estate, and that she allowed him to draw funds and manage the same, making improvements upon the estate, did not tend to establish that he was her agent to bind her separate property in this transaction.

THE action is upon two notes of \$1,000 each, made by the defendant Gabriella Miller payable to the order of Charles Miller, and by him indorsed. The defendant Charles Miller did not interpose any defense. The defense is, that these notes were given upon loans made by the plaintiffs to Charles Miller, the husband of said Gabriella, "for his use and benefit, and not for the use and benefit of the defendant, or for the benefit of her separate estate;" that she was an accommodation maker of the notes and surety thereon for her husband; and that the plaintiffs had knowledge of these matters when they discounted the notes.

The case was tried at the Schuyler county circuit, in March, 1871, before one of the justices of this court and a jury. The principal question litigated was, whether the notes were given for the benefit of the separate estate of Mrs. Miller. Exceptions were taken to the rulings of the justice upon the trial, which, so far as is material, are stated in the opinion. The jury found in favor of the plaintiff for the amount of the notes, and interest, etc. An order was made that the exceptions be first heard at general term.

*E. P. Hart*, for plaintiff.

*J. McGuire*, for defendant.

MILLER, P. J. The right of the plaintiff to recover in this action depends upon the fact, whether the defendant, who was a married



woman, gave the notes in question while engaged in carrying on a separate business, which was alleged to have been the purchasing of grain upon commission, by the instrumentality of her husband, acting as her agent in the prosecution of such business, with her knowledge and consent. The judge upon the trial allowed evidence of the declarations of the defendant's husband against the objection of the defendant, and charged the jury that the declarations of the husband, made at the time of the discount of the paper, were to be considered by the jury to establish an agency on the part of the husband for his wife. To each of these rulings an exception was duly taken by the defendant's counsel.

I think that the judge was in error in both of the rulings. The declarations made at the time he applied for the loan, to the effect that he was conducting the business for his wife, and that the business was his wife's business, and the statements made at the time the note was discounted, that the husband was the agent of the wife, were made without any direct authority, according to the proof. There is no evidence that she gave her husband any power thus to bind her, and procure the loan in question, nor that she said any thing, or did any act to bind herself, except the signing of the notes. The authority, then, to make representations outside and independent of the paper, which would create a liability, if it does exist at all, is only a matter of inference. It was not in the contract, and is not apparent from the papers upon which the money was obtained. The signing of the notes by the defendant Gabriella Miller, as maker, and the delivery to her husband, did not, I think, constitute the husband her agent to make declarations which would be obligatory upon her, independent of the contract itself. As the case stands, she signed the notes at her husband's request, without receiving any of the money realized, and without any knowledge what was to be done with it, or of its application. These circumstances did not confer any authority upon the husband to make representations in conflict with the plain import of the notes, or make him an agent of the defendant for any such purpose.

It cannot be claimed upon any sound legal principle, that the holder of a promissory note becomes the authorized agent of the maker to alter the contract and give assurances that the note is made for purposes not appearing upon its face. If the defendant had intended to charge her separate property, she could have mani-

festated such intention in the instrument creating the obligation. *Corn Ex. Ins. Co. v. Babcock*, 42 N. Y. 613; *Shorter v. Nelson*, 4 Lans. 114. To assert that she so intended without any such declaration, or even without any evidence of her own oral declarations to that effect, and only because the holder of the note so stated, is carrying the doctrine of implied agency far beyond what is authorized, either by the circumstances, or warranted by any adjudged case. No such authority can be thus conferred. In *Shorter v. Nelson*, *supra*; where the husband, acting as general agent with reference to his wife's separate estate, informed the plaintiff of her ownership of a separate estate, and induced him to credit her with goods and services for her husband's benefit, it was held, that the wife's estate was not charged, and that this was so, even although the wife had told the plaintiffs, while furnishing the goods, that they were for her and should be paid for out of her separate estate. There was proof in the case cited, to show that the wife stated that the husband was her agent. The case now considered is much stronger than the one last cited, as in the case at bar the obligation was in writing, and is only varied by the declarations of the husband, and not of the wife.

In *Bank of Albion v. Burns*, 46 N. Y. 170, where the real estate of the wife was mortgaged to secure the debt of her husband, it was held that she occupied the position of a surety and that she and those claiming under her are entitled to the benefit of the rules prohibiting the dealing of the creditor with the principal debtor to the prejudice of the surety; that an extension of the time of payment without her assent is such a dealing, and discharges the mortgage; and the agency of the husband to bind the wife, to be inferred from the possession of the mortgage, has respect to and is limited by the terms of the instrument.

ALLEN, J., says, after laying down the rule last above stated, "It, the instrument, "cannot be extended by implication. The most that can be inferred is, that the husband had authority to bind the property of the wife by the delivery of the mortgage to the plaintiff for the sum named, payable at the time and in the manner specified in the bond to which it was collateral; that is, to deliver the mortgage as a valid instrument, to take effect according to its terms." By parity of reasoning, the defendant's husband had only authority to deliver the note and receive the money without increasing the obligation which she had thereby created. It gave him no

unlimited power of attorney or agency to pledge her separate property for the payment of the debt, and his declaration could not affect her liability. When the maker of a promissory note gives it to another to enable him to raise money on it, without any directions or instructions, the maker is not bound by the representations made. *Jackson v. Fassitt*, 33 Barb. 645.

It is insisted by the counsel for the plaintiff, that the conversation and statement of the husband with the bank officers, when he applied for the discount and presented the note of his wife for that purpose, was properly received as a part of the *res gestæ* accompanying the request for the loan of and the presentation of the paper for discount. I am unable to see how the declarations proved can be regarded in any such light as is claimed,—as any authority to apply for a loan or to present the notes for that purpose would not necessarily imply a right or confer power to make representations, as is manifest from the cases cited.

- Nor, in my opinion, can the declarations of the husband be held competent upon the question of agency, as in a case where the proof of agency is doubtful and the alleged agent's declarations at the time may be submitted to the jury, with his acts, to accept or reject, as they shall find the fact of agency or not. There was no evidence in the case which authorized the admission of the declarations upon any such ground, and the authorities relied upon do not apply to the facts presented upon the trial of the case at bar. See *Cow. & Hill's Notes to Phillip's Ev.*, n., 183, and cases cited.

The only evidence of the husband's agency, in regard to binding the separate estate of the defendant in this transaction, was his own alleged declarations and acts. Not a single particle of testimony is introduced showing the acknowledgment or recognition of his agency by the wife, in this business. His insolvency, and the fact that she had secured other notes by bond and mortgage, or by transferring a bond and mortgage as collateral security, or that he had charge of her separate estate and that she allowed him to draw funds and manage the same, making improvements and repairs, does not, I think, tend to establish that he was her agent to bind her separate property in this transaction, or that the business in which he was employed really was hers. If such was to be inferred from these circumstances, it would be in direct conflict with the rule laid down in *Shorter v. Nelson*, before cited.

If facts of the character stated can establish an agency of the

husband, they would fix the liability of the wife in almost every case where he has acted or assumed to act on her behalf. This is going far beyond what the law intends, and I think no such doctrine can be sustained.

The exception to the charge does not, however, rest upon any such basis as is last discussed, for as will be seen the judge held, that Mrs. Miller having so far constituted her husband her agent in giving him the notes to be discounted at the bank, as was calculated to convey the impression to the bank that the paper was hers, she was the principal, and that whatever was done was for her benefit, and consequently the declarations made at the time of the presentation of her notes were proper evidence. He thus upheld the doctrine that he was her agent, by implication, which, as we have seen, was erroneous and is in conflict with adjudicated cases.

For the errors stated, a new trial must be granted, with costs to abide the event.

All concurred.

*New trial granted.*

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NORTHRUP, administratrix, etc., v. TOWN OF PITTSFIELD.

*Town bounties — mandamus — enlistments of non-residents — transfer of credit.*

At a special town meeting held in the town of Pittsfield, January 2, 1864, a resolution was passed that \$610 bounty should be paid to every person enlisting "from the town of Pittsfield," as a volunteer in the army, and credited to the quota of that town. Plaintiff's intestate, who resided in another town, enlisted and was credited to the quota of Pittsfield. Said intestate received a certificate of said enlistment and credit from the proper authority, which certificate was presented to the town auditors, and payment of the bounty demanded, in accordance with Laws of 1864, chap. 8. Payment was refused. After intestate's enlistment he was, without his own consent, transferred to the credit of another town. In an action against the town for such bounty, the town set up several grounds of defense.

*Held*, that the plaintiff's remedy was by action and not by mandamus. The rule is well settled that mandamus will only lie to give effect to a clear legal right.

*Held*, also, that although the proceedings before and at town meeting might have been legally defective, the provisions of Laws of 1864, chap. 8, § 1, though passed after such meeting, cured the defects and rendered the action of the meeting valid.

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The non-residence of the intestate did not affect the liability of the town for the bounty. Neither did the transfer of the credit, without the consent of intestate, to another town.

THIS action was brought to recover the sum of \$610, and interest from February 19, 1864, for an alleged indebtedness which, it was claimed, arose under the following facts: Under the call of the president of the United States, in the year 1863, for volunteers to serve as soldiers, on the 2d day of January, 1864, a special town meeting of the voters and citizens of the town of Pittsfield, in the county of Otsego, was convened, at which, by resolution, it was voted that the sum of \$610 should be paid to any and every person who should thereafter volunteer as a soldier in the army of the United States from said town, and be allowed on the quota thereof, under the call of the president, to be paid when the volunteer was accepted and mustered into the national service. A committee of five was appointed to carry into effect the resolution aforesaid, and, subsequently, the intestate who, on the 19th of January, 1864, was a resident of Delaware county, through the agency of one Root, a recruiting officer, enlisted, and, on the 19th of February following, was lawfully mustered into the service of the United States, and duly credited to apply upon the quota of men to be raised by the town of Pittsfield, as appears by the certificate of the provost marshal to the foregoing effect. This certificate was indorsed by the intestate to one Charles Maples for payment, was presented to the supervisor of Pittsfield, and afterward by him, as claimed, to the board of town auditors, and payment refused. It also appeared, from the intestate's enlistment papers, certified copies of which were introduced in evidence, that on the 31st of May, 1864, the credit of Northrup was transferred from the town of Pittsfield to the town of Delhi, by order of the paymaster-general. Objections were made, upon the trial, to the admission of the evidence of the proceedings at the town meeting, and a motion was made for a nonsuit on various grounds, and exceptions duly taken to the rulings of the judge. These appear in the opinion.

At the close of the testimony, the court directed the jury to find a verdict in favor of the plaintiff for the amount claimed and interest, \$908.91, which was done, and an exception duly taken to the decision of the judge. The counsel for the defendant asked the court to charge the jury that the defendant was entitled to a verdict, which was refused, and an exception was duly taken.

After the action was commenced, the intestate died, and his administratrix was made plaintiff by an order of the court. The cause was tried before Mr. Justice BALCOM and a jury at the Chenango county circuit, March, 1871, and the justice ordered that, upon exceptions being settled, the same be first heard at general term, with a stay of proceedings.

*C. S. Ames*, for plaintiff.

*Jenks & Materson*, for defendant.

MILLER, P. J. The first question which arises upon the facts presented in this case is, whether this action can be maintained against the defendant. It is claimed that the remedy is by mandamus, if any exist at all, in favor of the plaintiff, against the board of town auditors, and not by action against the town in its corporate capacity.

The right of the plaintiff to the amount claimed must depend somewhat upon the construction to be given to the first section of chapter 8, Laws of 1864. By this statute, it is provided that, in cases where a public meeting of the citizens of any town in this State, or the board of town auditors shall be held at, or in pursuance of which moneys shall be raised, borrowed or procured, or voted to be raised, borrowed or procured, or liability incurred, for the enlistment of volunteers, etc., "and such moneys have been paid out and expended, or liability incurred, by or under the direction of any committee, or of any person or persons appointed at such meetings, or by or under the direction of the officers of said town, acting or assuming to act in an official capacity, the moneys so paid and expended, and liability incurred, are hereby declared to be a debt against said town, to be paid with interest. And when a bond, etc., \* \* \* shall have been issued and given by such committee, or person or persons, or officer or officers thus acting, \* \* \* indicating the amount, \* \* \* such bond \* \* \* shall be evidence of the amount of such debt," etc.

If no sufficient bond, etc., shall have been given, then the claim "shall be audited by the board of town auditors of said town, as other claims against the said town are audited, and it shall be the duty of the said board of town auditors to pass upon, audit and settle the same, and to deliver to the claimant a bond" or certificate, etc.

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No bond was given or certificate issued to the plaintiff's intestate, in the first instance, showing that he was entitled to the amount claimed. And although the resolution adopted at the town meeting specified the amount to be paid to such volunteers, and with the certificate of enlistment that the intestate was lawfully mustered into the service, made out an indebtedness against the town, yet I think that they did not constitute such a bond or certificate as primarily entitled him, without further proceedings, to the amount claimed. He was bound to go further to maintain his claim, and it was necessary that it should be presented to be audited by the board of town auditors.

As there was evidence that the certificate was presented to the supervisor, and by him to the board of town auditors, and that payment was refused, the intestate had done all that was required, prior to the taking of legal steps to maintain his rights.

I am inclined to think that the refusal and rejection of his claim, by the board of town auditors, did not compel him to resort to a mandamus, inasmuch as the right was not entirely clear, and there was a specific legal remedy to which the party could have resorted. The rule is well settled, that a mandamus will only lie to give effect to a clear legal right. *People v. Supervisors of Chenango*, 11 N. Y. 563, 574; *Supervisor, etc., of Sand Lake v. Supervisor, etc., of Berlin*, 2 Cow. 485; *People v. Croton Aqueduct Board*, 49 Barb. 26, 264.

In the case at bar, there were several questions which were disputed, and presented subjects of controversy—the right of the recruiting officer to make the enlistment; the liability of the town for a volunteer, who resided in a town different from the one named in the resolution; the transfer claimed to have been made of the volunteer to another town, and the regularity of the town meetings, were all questions in dispute, which rendered the claim of the intestate at least doubtful, and, in my opinion, takes the case out of the rule laid down in the authorities, that the right to a mandamus must be entirely clear. The dividing line in the reported cases between the decisions, which sanction this remedy and those which leave a party to his action at law, is extremely close. A careful examination, however, will show that in all the cases relied upon by the defendant's counsel to sustain the doctrine that the remedy in the case now considered was by a mandamus, and not by action, it was entirely apparent that the right to the relief claimed was beyond dispute, where a mandamus was held to be proper. Such is indis-

putably the case where claims exist against counties, and can only be audited by means of the board of supervisors, or against towns or similar organizations, and are required to be presented and credited by the board of auditors. The cases cited by defendant are all of this character. In *People v. Town Auditors of Westford*, 53 Barb. 555, it was clear that the relator was entitled to the amount claimed by him from the town, and no question was raised as to there being a remedy by an action against the town. The same remarks are applicable to *People v. Martin*, 58 Barb. 286, and the decision there was put upon the distinct ground, that there was no dispute or denial of the facts. The other cases relied upon were decided upon the same principle.

That an action at law will lie for the enforcement of a claim of this character against a town has been held by this court in *Brown v. Town of Canton*, 4 Lans. 413, and in *Hathaway v. Town of Homer*, 5 id. 273. The principle decided in these cases has not been at all disturbed by the court of appeals, and the question was fairly raised in each of them. It does not affect the question discussed, because the statute required the claim to be presented to the board of town auditors. The amount is liquidated and settled quite as conclusively as if a certificate had actually been given, as was done in *Brown v. Town of Canton*. In *Hathaway v. Town of Homer*, the demand had never been presented to the auditing board, and I think that no distinction can be made, on this account, where the legality of the entire claim is a subject of dispute. Other cases of a recent date also sustain the doctrine, that the remedy for the enforcement of a liability of a similar character is by action at law. See *Buck v. City of Lockport*, 43 How. 361; *People v. Hawkins*, 46 N. Y. 9. In the last case, which was an application for a mandamus, it was said, upon the appeal, by CHURCH, Ch. J., "It is sufficient to say that the legal right in favor of the plaintiff is far from being clear."

After a careful examination, I am of the opinion that this was not a case for a mandamus, and that the action was properly brought against the town.

Several other objections are urged to the right of the plaintiff to recover in this action. It is claimed that no application was made for, nor notice given of the special town meeting at which the bounty was voted, as required by the Revised Statutes. 1 R. S. 341, §§ 7 and 8. This distinct objection was not taken, either to the admission of evidence or on the motion for a nonsuit, and, there-



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fore, is not now available. If it were now presented, I am inclined to think that this formality was dispensed with by the act of 1864, chap. 8, § 1, which provides for "all cases where a public meeting of the citizens of the town" has been convened, and was, no doubt, intended to meet the exigencies of the occasion by disregarding strict rules where meetings had been held prior to the enactment of the law, as was the case here.

The objection urged, that it was not shown that there was a majority of the town present, or that the resolution was adopted by a majority vote, is also unavailable, because the statute does not require that a majority of the electors of the town should be present, and under the law of 1864, it was enough that the resolutions were passed by a majority of those who were present at the meeting.

Although one of the resolutions provided for enlistment "from the town of Pittsfield," I think, the fact that the volunteer resided elsewhere does not preclude his right to the bounty or discharge the town from liability. The papers show that he enlisted at Pittsfield, and was credited to that town. The town received the benefit of his enlistment, and should not be allowed to escape payment upon any such ground. After having been credited upon the quota of the town, with the knowledge and consent of its authorities, it does not rest in the town now to question the power of its agent in procuring enlistments.

The alleged transfer of the intestate to the town of Delhi, without his knowledge or any evidence to establish that he was a party to the same, does not relieve the town from liability. It was primarily liable, and the order of no official can transfer or discharge such liability, without the assent and approval of the volunteer.

There was no request to go to the jury upon any of the facts, and the judge was right in directing a verdict in favor of the plaintiff. There was no error upon the trial. The motion for a new trial must be denied, and judgment ordered in favor of the plaintiff upon the verdict, with costs.

*Judgment accordingly.*

## BARBER V. MARBLE.

*Lease—covenant in. Pleading—complaint—sufficiency of.*

A lease of a farm from B. (the plaintiff) to D. contained the following provision: "Whenever any of the products of said farm shall be sold or disposed of all proceeds shall be paid to said B., until he shall receive the full rent of said farm yearly." *Held*, to be a mere personal covenant, and that it gave the lessor no lien upon the proceeds of the farm for his rent.

Defendant forwarded to New York a quantity of butter, the product of said farm, placed in his hands by the lessee, sold the same and received the proceeds therefor. Subsequently, the lessee surrendered his lease by a written release, including the products of the farm and the proceeds of the butter in question, which were specifically mentioned. In an action for the proceeds of the butter, in the complaint, plaintiff claimed a right to such proceeds under the provisions of the lease, and also alleged "That said plaintiff was entitled to said proceeds, and that he claimed the same, and that previous to receipt of said proceeds the plaintiff notified the defendant that plaintiff claimed the proceeds of said butter, and before the commencement of this action said proceeds were duly demanded of defendant and refused," etc. The assignment contained in the release was not specially pleaded in the complaint. Defendant's answer, among other things, alleged that said proceeds were not the property of the plaintiff, but of the lessee, and that plaintiff had no claim or lien on them. At the trial the release was introduced in evidence, without objection on the part of defendant.

*Held*, that with the aid of § 173 of the Code, liberally applied in furtherance of justice, a recovery could be upheld.

MOTION by defendant for a new trial upon exceptions ordered to be heard in the first instance at general term after verdict for the plaintiff at circuit. The facts appear in the opinion.

*E. P. More*, for plaintiff.

*H. Ballard*, for defendant.

P. POTTER, J. This action was tried at the Madison circuit in February, 1873. The complaint was based upon a lease from plaintiff to one William Donegan, of a farm and personal property in the town of Pompey, in said county, for a period of three years, "at the yearly rent of \$500, to be paid to said Barber whenever any of the products of said farm shall be sold or disposed of; all pro-

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*ceeds of said farm shall be paid to said Barber, until he shall receive the full rent of said farm yearly."*

During the fall of the first year the tenant, Donegan, took a quantity of butter, the proceeds of cows leased with the farm, and left it with the defendant, either by a sale or to be disposed of by the defendant for him, Donegan, upon which terms there was a conflict of fact. The jury found that it was not a sale, but that the butter received by the defendant was to be forwarded to the New York market and sold, and the proceeds to be accounted for by the defendant. The net proceeds amounted to about \$122.30, which came to the hands of the defendant.

The plaintiff's complaint proceeds upon the theory that these proceeds belong to the plaintiff by virtue of the above provisions of the lease, and that defendant had notice of those provisions. The defendant claims that he purchased the butter of the tenant Donegan; that Donegan was indebted to him for "merchandise sold," and that he retained these proceeds, as per agreement with Donegan, to the amount of his demand against Donegan, the tenant, and denies that plaintiff had any lien or title thereto, by virtue of the terms of the lease. These were, substantially, the issues upon the pleadings.

Upon the trial the plaintiff introduced in evidence, without objection at the time, his lease, and also a release written thereon signed by plaintiff and the tenant Donegan, dated 11th December, 1871, surrendering the lease before the end of the first year, in which release Donegan surrendered up to the plaintiff the property described in the lease, real and personal, to take effect the 1st of January thereafter, "with all the products of the farm and said personal property, and the proceeds of the butter lately sent to New York by Marcus Marble, of Delphi."

The plaintiff then proceeded to prove the admissions of the defendant — that he had sent the butter to New York to sell for Donegan; that he had not purchased it — and then proved notice to defendant that the butter belonged to plaintiff, and that the money must be kept for him, and rested his case.

The defendant's counsel then moved that the plaintiff be nonsuited, on the following grounds:

*First.* "That the lease gives the plaintiff no lien upon the property." *Second.* "That the plaintiff cannot recover under the complaint in tort on the assignment, for the reason that it is not alleged in the complaint." *Third.* "That there is no proof on the part of

the plaintiff upon which he can recover under the complaint." The motion was denied, and there was an exception.

The first ground of objection in law, I think, was good, and so the judge subsequently held and charged. The agreement in the lease was only a personal covenant of the lessee to pay the proceeds of the farm, when sold to the lessor. There was nothing in the lease that restrained the lessee from absolute dominion over the products or the right to sell them.

The second ground of objection was true, as matter of fact. The complaint, in the first and second counts, was technically upon the right of title to the products of the farm under the provisions of the lease, and especially after notice to the defendant of such right. The third count of the complaint, however, does set forth in general terms, "that the plaintiff was entitled to said proceeds, and that he claimed the same, and that previous to the receipt of said proceeds the plaintiff notified, or caused the defendant to be notified, that the plaintiff claimed the proceeds of said butter, and that before the commencement of this action the said proceeds were duly demanded," and if this general charge can be separated from the particular—the claim of title under the provisions of the lease—this objection to the complaint would not be good, provided the plaintiff proved title by virtue of another instrument. The defendant's fifth answer seems to have anticipated some other title than the lease itself, and is in the following words: "He avers that the butter and the proceeds thereof, set out in the plaintiff's complaint, was not the property of the plaintiff, and that he had no lien or claim thereon or thereto, but the same belonged to and was the property of one William Donegan," etc., to which plaintiff added a general reply. This is broad enough to put in issue the general question of title.

On the trial, and before the motion for nonsuit was made, the plaintiff had proved another title to the butter and its proceeds other than his claim under the provisions of the lease. He had an assignment of it from Donegan, the tenant, to him in the instrument of release or surrender in these words: "*And the proceeds of the butter lately sent to New York by Marcus Marble,*" etc. He had proved a cause of action, whether it was set forth in the complaint or not. It is quite clear that the plaintiff and his counsel were mistaken in their theory and legal view, that the lease by its terms conferred title to the products of the farm or of the dairy upon the plaintiff, but it may be that, by the lack of skill in plead-

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ing, or by the accident of a general claim of title set forth, with the aid of section 173 of the Code, liberally applied in furtherance of justice, that the recovery may be upheld, even if there are no other objections.

This was, probably, the view taken by the judge on the trial, for at the end of the case the defendant's counsel asked him to direct a verdict for the defendant upon the whole case, and upon the ground that the contract gave him no lien on the property, and that no action could be maintained upon the assignment. The court declined, and held, that the plaintiff could only recover against the defendant as upon the assigned account; that there was no lien upon the butter; that the question involved was whether Donegan, the tenant, previous to this assignment, had sold this butter to the defendant, or not; that the question for the jury was, whether or not this butter was delivered by Donegan to the defendant, for the purpose of selling on commission, or delivered to him on purchase; that the lease contained no lien; and that the release contained an assignment, etc. This view of the judge presents the whole case up to this stage of the trial, and seems to be right, if there was any such issue to be tried as a claim upon the assigned account, or, if the judge had the power to conform the pleadings to the proof given on the trial, and upon the assumption that that issue was not in the pleadings. No motion was made to amend; nor was that necessary if the case comes within the class of cases in which the court is authorized to make the amendment, if such amendment would be in furtherance of justice.

Section 173 of the Code gives the power to amend, but with this qualification, that the amendment does not change, substantially, the claim or defense. The plaintiff's claim was specific and limited, and arose out of the leasing or releasing of the same property; the amount would not vary whether it was the one or the other. In either event, it was between the parties to the contract, and the same form of action would be proper upon whichever agreement or instrument it depended. A nonsuit upon the one hypothesis would have left the case to be tried again, substantially, upon the same proof. Both the lease and release must be proved, in any other action or form of action. I think, under the liberal spirit, as well as the letter of the Code, it authorized the ruling of the judge, even if the assigned account is not fully set forth in the pleadings, of which I am not clear.

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I think the practice of the court is in favor of this liberality and of such a construction of the Code. The cases of *Van Duser v. Howe*, 21 N. Y. 531, 539; *Bank of Havana v. Magee*, 20 id. 355, 359; and, especially, *Hall v. Gould*, 13 id. 127, 134; also, *Hunter v. Hudson River Machine Co.*, 20 Barb. 493, have gone as far as was done in the case at bar. I do not, therefore, see that the judge erred in his ruling on the trial. If we are right in these views, the second ground on motion for nonsuit is without merit.

There is but one other legal point in the case, raised by the defendant, that seems to be worthy of notice. The defendant requested the court to charge, "that the witness Donegan had a right, under the lease, to sell the butter, and the defendant had a right to purchase it, even if he had knowledge at the time of the contents of the lease." The court refused. The court had already charged these propositions distinctly, in effect, and was not bound to repeat them. At the end of the case, upon the motion for a verdict in favor of the defendant, the court expressly decided, in effect, that there was no lien in the lease, and that Donegan had a right to sell at any time before the assignment in the release. The judge does not give his reason for the refusal, but a sufficient reason is found in his rulings, which could not be mistaken.

Though we have not been at all aided by the plaintiff's brief, which presents and persists in a wrong theory of law, as applicable to the case, I think justice has been done, and no errors are found requiring a new trial. I think a new trial should be denied, and judgment entered for the plaintiff, with costs.

MILLER, P. J., and PARKER, J., concurred.

*Judgment on the verdict, with costs.*

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FIRST NATIONAL BANK OF GROTON v. CRITTENDEN *et al.*

*Promissory notes — presentment and demand — notice — waiver.*

A note was discounted and held by the bank where it was made payable. At the time it became due the maker had no funds at the bank for its payment. *Held*, that no formal demand of the maker was necessary under the circumstances, for the purpose of charging the indorsers.

A notice was dated and mailed upon the next day after the note became due, and stated that the note was "this evening protested for non-payment, the

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same having been duly presented and payment demanded, which was refused." *Held*, that the notice was mailed in time, and was, in form, a good notice of demand and refusal, upon the day preceding.

A promise by an indorser to pay an over-due note must be made with full knowledge of any defect in the demand and notice, in order to amount to a waiver of such defect (per P. POTTER, J.).

*Montgomery County Bank v. Albany City Bank*, 8 Barb. 398; S. C., 7 N. Y. 45, distinguished.

EXCEPTIONS ordered to be first heard at general term. The case was tried before Justice BALCOM and a jury, at the Tompkins county circuit, in October, 1872. The action was brought upon a promissory note, of which Howell, one of the defendants, was maker, and the other defendants indorsers, which fell due on the 25th day of November, 1870. It is contested by the indorsers alone, on the ground of defective notice. The note was discounted at the plaintiff's bank. One of the indorsers, Hopkins, resided at Groton, where the plaintiff's bank is located, and the other, Crittenden, resided at Lansing, and received his mail at North Lansing. The notices of protest to both of the indorsers were deposited, at the same time, in the post-office at Groton, on the 26th day of November, 1870, the day after the note in question fell due, by Mr. Marsh, the cashier of the bank, between four and five o'clock, P. M., and the postage paid thereon.

There was then a daily mail from Groton to North Lansing, by way of Ithaca, which left Groton at a quarter past five o'clock, P. M. The post-mark upon Crittenden's notice, the only one produced, was November 26th, and, as testified to by the postmistress, letters were invariably stamped of the date when they left the office, in the mails, for the place of their destination.

There was evidence to show a waiver of the notice, by proof of an agreement to pay after the note became due by the indorsers; but inasmuch as the general term held that the notices were properly served, and the note itself sufficiently specific, it is not material to state the facts in reference to this branch of the case. At the close of the plaintiff's testimony the counsel for the defendants moved for a nonsuit, upon the grounds that no protest of the notes was made on the last day of grace, November 25th, and that the notices served were deficient for the reason that they refer to an alleged protest made on the 26th, instead of the 25th, of November, which motion was denied, and an exception duly taken to the decision of

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the justice. The motion was renewed at the close of the whole testimony, upon the following, among other grounds, not material to be stated, viz.:

*First.* That to fix with liability either of the indorsers on the note in suit, Crittenden or Hopkins, a formal protest for non-payment by the maker Howell, must have been made, or facts must have existed, constituting a dishonoring of the note by the maker on the day of its maturity, November 25, 1870.

*Second.* That to fix each of the indorsers with liability, it must also be shown that due notice of such protest or dishonor of the note was given to him as soon as the following day, November 26, 1870.

*Third.* That the notice of protest shown to have been served on each, bearing date November 26, 1870, and stating the protest for non-payment by the maker to have been made on the evening of that day, the 26th, was defective, and not sufficient to charge either indorser with liability.

The motion was overruled by the justice, who laid down the following propositions as the law of the case, in reference to the questions considered.

*First.* The note in suit being in plaintiff's bank, where it was payable on the 25th day of November, 1870, the law adjudges that payment of it was then and there duly demanded, and as the maker had no funds then and there for its payment, it was then dishonored.

*Second.* The notices of protest, etc., to the defendants as indorsers of the note, were mailed in due time, and the postage paid thereon on the 26th day of November, 1870, and before the mail was closed on that day, which went the way the notice was sent to Crittenden. Hopkins resided at the place where the notice to him was mailed.

*Third.* The notices sent to the indorsers were sufficient. The clause in them that the note having been duly presented and payment demanded, which was refused, should be construed as notice that the note was presented, etc., on the proper day, for the notices ought to be construed, as the defendants were bound to read them without any reference to the proof here given of extraneous circumstances.

*Fourth.* The defendants were duly charged as indorsers of the note, and are liable to pay the same.



The defendant excepted to the decision of the court denying the motion for a nonsuit and to the rulings and decisions, and each of them separately, and asked the court to submit to the jury the questions as to the demand of the note on the 25th of November; as to the mailing of the notices of protest to indorsers, on the 26th of November, and whether the clause in the notices of protest, that the same having been duly presented and payment demanded, which was refused, should be construed as a notice that the note was presented and payment demanded on the proper day, viz., on the 25th of November, 1870, which requests were severally refused, to which refusals the defendants duly excepted.

The court then directed a verdict in favor of the plaintiff for the amount of the note and interest, \$1,852.62, to which direction the defendants duly excepted.

The jury, under the direction of the court, found a verdict in favor of the plaintiff for the sum aforesaid. An order was made allowing time to make and serve a case, and exceptions and amendments, and the justice directed that the exceptions be first heard at general term.

*George Sidney Camp*, for plaintiff.

*Lyon & Donnelly*, for defendants.

MILLER, P. J. It must be assumed as an established fact in this case, that the notices of protest were deposited in the post-office at Groton, where the bank was located, as required by law. The evidence abundantly establishes that such was the case, and there was, I think, no question for the jury to pass upon in this respect.

In this aspect of the case, the question arises whether the notices served on the 26th of November were sufficient to fix the liability of the indorsers. The notices given stated that the note in question "was this evening protested for non-payment, the same having been duly presented and payment demanded," etc.

There was no evidence that a formal demand of the note was made. Having been discounted by the bank at whose counter it was payable, and belonging to the plaintiff, the law adjudged that payment of the note was then and there duly demanded, and as the maker had no funds at the bank for its payment, that it thereby became dishonored.

No formal demand of the maker was necessary, under the circumstances, for the purpose of charging the indorsers. *Gillett v. Averill*, 5 Denio, 88; *Bank of Syracuse v. Hollister*, 17 N. Y. 49; *Woodin v. Foster*, 16 Barb. 146, 149; *Nichols v. Goldsmith*, 7 Wend. 162; *Dole v. Gold*, 5 Barb. 498; *Gilbert v. Dennis*, 3 Metc. 498.

The case of *Montgomery County Bank v. Albany City Bank*, 8 Barb. 398; 7 N. Y. 459, is not in conflict with this rule. In that case the draft in question was not payable at a bank, but left for collection. The general rule laid down, therefore, that bills, notes and checks, when payable at a time certain, must be presented on the day they fall due, cannot affect the case now considered; for, according to the authorities, the note now in question was so presented and a demand duly made. Nor can there be any question that the formal protest, which is a mere statement that a demand has been made, and its result, need not be made on the day of the demand, but may be made afterwards. Chitty on Bills, 499, note c, 509 (Spg. ed. of 1836). The question to be considered in this connection then is, whether the notice in form was sufficient so as to hold the indorsers. This depends on the construction to be placed upon the language employed. An erroneous statement of the notary, in regard to the act done by him, is material. If the notice bears date on the third day of grace, and states that the note in question was last evening protested for non-payment, or if the notice bears date on the 4th day of July, and states that payment of the note had that day been demanded and refused, it is insufficient and discharges the indorser. It is virtually equivalent to a notice that he is exonerated from liability, and it does not inform him that the paper has been dishonored. It is, however, sufficient if it does not mislead the party, even if it be informal and defective. Edw. on Bills and Notes (1st ed.), 591, 592 (2d ed.), 558, 559. In *Ransom v. Mack*, 2 Hill, 587 the notice stated, that a demand had been made on the 4th of July and payment refused, although the proof showed that a regular demand had been made the day previous, and it was held, that the notice was insufficient, as it stated the wrong day. BRONSON, J., said, "If the notice had been that the note was duly presented, or if nothing had been said about presentment, the defendant might have inferred that a demand had been made at a proper time; but he was told that the holder relied on a demand which was utterly void; and instead of taking up the note and looking to the maker, he had a right to consider himself discharged."

It is quite apparent that the defect in the notice in the case cited was calculated to mislead the defendant, and, I think, very properly held that the notice was invalid. In *Wynn v. Alden*, 4 Denio, 163, the notice stated that the note had been "this day presented," etc., and was without date. It was held to be defective, as being without date; it was impossible to determine what date was intended, and whether it was before, or after, or on the day the note became due. The defect was a serious one, and I think that the point decided does not affect the question now considered. But, even if it is applicable, the case cited has been virtually overruled by *Youngs v. Lee*, 12 N. Y. 551, where it was held, that a statement in the notice that the note is protested for non-payment is sufficient notice of presentment and demand, at the time and place of payment. See, also, *Artisans' Bank v. Backus*, 36 N. Y. 112. In *Walmsley v. Acton*, 44 Barb. 312, the note was due on the 9th and the notice of protest was dated the 10th, and stated that the note "was this day protested," without being signed by any one. It was held to be insufficient for want of a signature, as well as for the reason that it stated the time of protest to be the 10th, which was erroneous. This defect was clearly calculated to mislead, and is not in any way analogous to a case where the notice stated that the note had been "duly presented and payment demanded." The learned judge, in his opinion, cites *Wynn v. Alden*, *supra*, and *Ransom v. Mack*, *supra*, in support of the last ground; but I think they do not uphold this view. As to the first case, it is in conflict with the second, and, as we have seen, has been overruled. As to the latter, *Ransom v. Mack*, the words used were "this day demanded," which differs essentially from "this day protested." The case of *Walmsley v. Acton* must stand on the strong ground that the notice was without signature, and, therefore, invalid; and none of those, relied upon by the defendants, meet the facts presented by the notice in the case at bar.

It may also be remarked, that in none of the cases cited by the defendants was the note discounted by or belonging to the bank, who was the owner here, and at whose banking-house it was made payable. As we have already seen in cases of this character, no formal demand of payment is required, and the presumption is, that the demand was actually made when the note became due. In *Arnold v. Kinloch*, 50 Barb. 44, the notice was verbal, and extremely informal, merely stating that the note had not been paid, and re-

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questing payment. It has, I think, no application to the case at bar where the effect of a written and formal notice is to be considered.

As no demand was really necessary, the statement that the same had been duly presented and payment demanded was, perhaps, within the authorities an immaterial circumstance, and would not vitiate and render ineffective the whole notice, as it has been expressly held that the notice need not state that the demand of payment was made. *Cayuga Co. Bank v. Warden*, 1 N. Y. 419.

It has not been held in any case that the notice should advise the indorser when the demand was made. See *Young v. Lee*, 12 N. Y. 551; *Artisan's Bank v. Backus*, 36 id. 100. It is enough if the language employed is such as, in express terms, or by necessary implication, conveys notice to the indorser of the identity of the note, "and that payment of it, on a presentment, has been neglected or refused." *Cayuga Co. Bank v. Worden*, 1 N. Y. 413; *Cox v. Clift*, 2 id. 118. The object is to enable the indorser to take measures for his own security. *Bank of Cooperstown v. Woods*, 28 N. Y. 545, 559.

Regarding the language employed in the light of the principles laid down in the authorities on the subject, I think that the fair construction of the words to be interpreted is, that the note was protested on the day of the date of the notice; that it was duly, that is, properly and lawfully, on the day and time at which it became due, presented for payment, and payment on that day and at that time demanded and refused.

The language employed expresses, in clear terms, the idea that the presentment and demand of payment, if necessary, was made in season, and at the right place. It conveyed all the information to the indorsers which enabled them to take the necessary steps to protect themselves.

If the views expressed are correct, and the notices were properly mailed and in proper form, the indorsers are liable, and the other questions raised are of no importance. Even if the judge on the trial was in error in his other rulings, it cannot affect the case, and is no ground for a new trial.

A new trial must be denied, and judgment ordered on the verdict for the plaintiff, with costs.

P. POTTER, J. The plaintiff was the *bona fide* holder and owner of the note in question for value. The contract which the law

implies between the indorser and indorsee or holder of such a note is conditional. The condition is, that the indorsee shall perform two distinct acts on his part, to wit: 1st, that in case of non-payment by the drawer, the indorsee shall duly present the note for payment on the last day of grace; and, 2d, that the indorsee shall give immediate notice of the dishonor or non-payment to the indorsers. Unless these two conditions are performed, the indorsers are released from liability. The place of payment in this case was the plaintiff's bank. This was the place to present the note. The time to present the note was the 25th of November, 1870. The note on that day was in the plaintiff's bank, and as the law will presume, ready to be surrendered on payment. The drawer on that day was not at the bank; he had no funds there to meet the note. No personal demand could be made of him. He had not had any funds there; he did not afterward have funds there to meet the note. The first question therefore is, was there such a demand of payment as will meet this requirement of the law, and of the contract?

I understand the law to be that it was the drawer's duty to be at the bank within the usual hours of business on the last day of grace to pay the note; that he has the whole period of the usual banking hours to pay it, and if he does not pay it within those hours, it is equivalent to a demand and refusal on his part. This was so held in *Bank of United States v. Carneal*, 2 Peters, 548. That the drawer would so attend to the payment of his note is the implied agreement of the indorser, not, however, waiving the right to notice in case of dishonor. See *Berkshire Bank v. Jones*, 6 Mass. 525. With full knowledge by the plaintiff of the omission of the drawer to meet his obligation; his neglect to appear in person; and in the absence of funds to pay the note, the formal demand of themselves, or of an empty room with nobody to hear it, would have been an idle, as it would have been a useless, ceremony. *Bank of Syracuse v. Hollister*, 17 N. Y. 49. It was expressly held in the case of *Gillett v. Averill*, 5 Denio, 85, "that where a note is held by a bank payable at the same bank, no formal demand of the maker is necessary in order to charge the indorser. It is sufficient if the maker have no funds there at its maturity to meet it." No unmeaning proclamation at the close of banking hours is necessary; it is never made in such cases. See *Ogden v. Dobbin*, 2 Hall, 112; *Edwards on Promissory Notes* (1st ed.), 497; *Saundison v. Judge*,

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Hen. Black. 509; 3 Greenl. 147. The sufficiency of the demand in this case, according to the cases cited, and under the circumstances, I think, may be held.

The protest of this note, it is also claimed, not having been made until one day after the last day of grace, was too late. The protest of a note creates no liability upon the indorsers, and is not a necessary act to secure that end. It may be and usually is performed at the time of presentment and demand of the note on the last day of grace, and in this case, it seems to have been somewhat confounded with the act of demand as a *necessity*, in order to fix the liability; but this is a mistake, so far as relates to promissory notes or to inland bills of exchange. In many cases the protest by a notary may be important to the holder as evidence, inasmuch as the law has made it *evidence* of the fact of a due presentment to the maker and of due notice to the indorser, which, in case of death, or other accident, or absence of witnesses, is admissible to prove those facts. It is a mere solemn declaration in writing, by a public notary under seal, that the note or bill (describing it) was on a certain day presented for payment or acceptance, and that such payment or acceptance was refused, and then protests against the parties *liable* for all costs or damage which may arise therefrom. This protest may be made at the time of presentation and demand, or at any time afterward.

The other condition in the contract of indorsement is, that the indorser shall have immediate, or, as it is sometimes expressed, reasonable notice of the dishonor. There are abundant and substantial reasons why this condition should be performed, not necessary here to discuss. The law determines with great precision what is reasonable time. It may be given on the day of dishonor after business hours; it may be given on the next business day. *Howard v. Ives*, 1 Hill, 263; *Chitty on Bills*, 513; *Cuyler v. Stevens*, 4 Wend. 567; *Edw. on Prom. Notes*, 615. All these cases and authorities hold that the next day after demand or presentation is within a reasonable time—in other words, is immediately. The evidence in this case is, that notice of dishonor was mailed on the 26th of November, which was the day following the last day of grace. If we are right upon the first preceding point that the maker's default on the preceding day to be at the place of payment, or to have funds there to meet his note, is equivalent to a demand refused, then the notice in this case was in time and was sufficient

in form. True, the clerk in the bank, by an error in the calculation of time, entered the note in the books of the bank as falling due on the 26th. Had the drawer been ready on the 25th, or had he funds in the bank on that day to meet the note, this mistake might have been material, but as it turned out it was of no materiality. So far as presentment and demand was in question, as much was done by way of demand on the 25th as on the 26th. The needless empty formality was legally dispensed with by the drawer's default to do those things, which the indorser's implied contract was that he should do. The notice of dishonor was in time on the 26th. The notice, that it "*was this evening protested,*" was a good notice of protest, if any notice of protest was necessary, and the protest then made was in time. The notice does not state that the note had been on that day presented and payment demanded, but that the "same had been duly presented and payment demanded." This was true according to the letter, and according to law as we have held. It could not, it did not, mislead the indorsers, or deprive them of any remedy against their principal by any delay. I think, therefore, the indorsers had legal notice of the dishonor, and within the legal time — within reasonable time.

If we are right in the foregoing views, it becomes unnecessary to discuss the question in the case upon which the plaintiff's counsel seems to place the greatest weight, viz.: The indorser's agreement to pay or settle the note after notice of dishonor, thereby waiving all defect in the notice. This claimed agreement on the part of the indorsers, as the evidence shows, was a negotiation to settle, with the understanding on their part that the note had been duly presented and payment demanded of the drawer on the last day of grace. Before the settlement was consummated, but while the parties were together, the note being produced, its date examined, and calculation of time being made, and comparing it with the date of the notice of dishonor and protest, they discovered, as they supposed, a defect in the date of presentment, demand and protest, which released them from liability as indorsers. Their only agreement to pay or settle was based upon the mistaken assumption of *fact*, that the last day of grace was the 26th instead of the 25th of November. When they learned this mistake they refused to give their notes and to consummate the settlement, under the belief that they were released from liability.

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In my opinion, the agreement or attempt to settle by a party in ignorance of the facts, or upon a mistaken assumption of facts, or without full knowledge of the facts upon which the agreement or promise is made in such case, cannot be regarded as a waiver of all defects in the presentment, demand, or in the service of notice. In the nature of things, upon moral principle, upon the principle of good common sense, it would be wrong so to hold. It is upon the same principle as that of the ratification of the unauthorized act of an agent. It is only a waiver of obligation, or ratification of the act, when the agreement is made with full knowledge of all the circumstances relating to the subject. By the refusal of the indorsers to fulfill or carry out the agreement, they stood just as they did before the negotiation. But it is unnecessary further to discuss this point. If we are right upon the point first examined, the verdict should be sustained and judgment entered thereon for the plaintiff, with costs.

PARKER, J., concurred in the result.

*Judgment on the verdict.*

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MONGEON, plaintiff in error, v. PEOPLE.

*Manslaughter — repeal of statute — saving clause — Laws 1869, chap. 631 —  
Laws 1872, chap. 181 — general repealing act.*

Plaintiff was indicted, tried and convicted of manslaughter in the second degree, under Laws 1869, chap. 631, § 1, relating to abortions. The act was committed March 15, 1872, and the indictment, trial and conviction were had April 24, 1872. On the 6th of April, 1872, a law was passed (Laws 1872, chap. 181), changing the character of the offense and increasing the punishment. By § 5 of such law all acts and parts of acts inconsistent therewith were repealed, and by § 6 it was directed to take effect immediately.

*Held*, that the provision in question of the act of 1869 was inconsistent with and was repealed by the act of 1872; and there being no saving clause in the latter act, the repeal was applicable to offenses committed prior to its passage as well as to prospective offenses, and under the provisions of that act plaintiff would not be liable to indictment for the offense he had committed.

But the provision of § 6 of the general repealing act of 1828 (3 R. S. 155; 1 Stat. at Large, 72), that "no offense committed, and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed,



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shall be affected by such repeal," etc., is applicable to the law of 1869; and such statute continued in effect as to the offense and penalty, and the indictment, conviction and judgment against plaintiff were right.

ERROR to St. Lawrence sessions to review conviction for manslaughter. The facts sufficiently appear in the opinion.

*B. H. Vary*, for plaintiff in error.

*L. W. Russell*, for defendants in error.

PARKER, J. This case has been brought into this court by writ of error to the St. Lawrence sessions.

On the 24th day of April, 1872, the plaintiff in error was indicted in that court for manslaughter in the second degree, under section 1, chapter 631 of the Laws of 1869, which is as follows:

"§ 1. Any person who shall administer to any woman with child, or prescribe for any such woman, or advise or procure her to take any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to produce the miscarriage of any such woman, unless the same shall have been necessary to preserve her life, shall, in case the death of such child or of such woman be thereby produced, be deemed guilty of manslaughter in the second degree."

On the same day on which he was indicted, he was tried in the same court and convicted, and sentenced to imprisonment in a State prison for the term of seven years.

The record shows the crime to have been committed on the 15th day of March, 1872.

On the 6th day of April, 1872, chapter 181 of the Laws of 1872 was passed, in which are the following provisions, viz. :

"§ 1. Any person who shall hereafter willfully administer to any woman with child, or prescribe for any such woman, or advise or procure her to take any medicine, drug, substance or thing whatever, or shall use or employ, or advise or procure her to submit to the use or employment of, any instrument or other means whatever, with intent thereby to produce the miscarriage of any such woman, unless the same shall have been necessary to preserve her life, or that of such child, shall, in case the death of such child or of such woman be thereby produced, be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in a State

prison for a term not less than four years nor more than twenty years.

"§ 5. All acts and parts of acts inconsistent with this act, are hereby repealed.

"§ 6. This act shall take effect immediately."

No bill of exceptions was made, and the first question in the case is, whether or not section 1 of the act of 1869, above quoted, was so far unrepealed by the said act of 1872, that the plaintiff in error could be indicted and punished under it for the offense committed by him on the 15th of March, 1872.

Section 1 of the act of 1872 covers the entire ground of section 1 of the act of 1869, with some additions, and changes the whole character and effect of the forbidden acts (so that they no longer constitute manslaughter in the second degree, punishable by imprisonment in the State prison for a term not less than four nor more than seven years) to that of a felony punishable in the State prison for a term not less than four nor more than twenty years.

There can be no doubt, therefore, that the whole section of the first act is repealed. Clearly, as that section stood in the act of 1869, it is inconsistent with section 1 of the act of 1872. The whole scope of the section in the first act was to make certain acts manslaughter in the second degree. This is all changed by the second act, and the same acts are no longer manslaughter, as before, but a general felony, to which is annexed a more severe punishment. Both sections cannot stand together, but that in the former act, being inconsistent with that in the latter, is, by section 5 of the latter act, expressly repealed.

It is urged by the learned counsel for the defendants in error, that, inasmuch as the act of 1872 is, by its terms, wholly prospective and applicable only to future offenses, it could not be inconsistent with the former act so far as it was applicable only to prior offenses, and hence that the effect of the repeal of such act, or any part of it, was only upon its application to future offenses.

But, as we have seen, the first section of the former act is, in itself, *clearly inconsistent* with the first section of the latter, and the repeal is in terms of "all acts and parts of acts *inconsistent* with" the latter act. From the time of the passage of the latter act, therefore, the first section of the former act was, by the terms of the latter, expressly abrogated. There being no reservation, or saving clause in the new act, as to offenses theretofore committed,

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the repeal was absolute, and cannot be construed into a limited repeal, a repeal with a saving clause not contained in it. The repeal here does not rest upon implication, though that would be sufficient in this case, for "when a new statute covers the whole subject-matter of an old one, and adds offenses, and prescribes different penalties from those enumerated in the old law, it is by necessary implication a repeal of the former statute." Potter's Dwaris, citing *Norris v. Croker*, 13 How. (U. S.) 427, which is precisely this case.

But the repeal here is express, and cannot, by construction, be made less than an absolute and total repeal — there is no ground appearing by the whole act indicating such intent — and hence there is no warrant for taking it in a limited sense. Nothing, either, can be inferred in favor of its being a limited repeal, from any supposition that the legislature could not have intended to permit a criminal guilty of a grave offense to escape punishment.

"In the enactment of statutes the rule of interpretation is, in respect to the intention of the legislature, that, when the language is explicit, the courts are bound to seek for the intention in the words of the act itself, and they are not to be at liberty to suppose, or to hold that the legislature intended any thing different from what their language imports." Potter's Dwaris, 146.

In *Hartung v. The People*, 22 N. Y. 97, Judge DENIO, in giving the opinion of the court, says: "By the terms of the statute (chap. 410, Laws of 1860) all those portions of the existing statutes which provided for the punishment of death on convictions for crime were repealed, *without any saving in respect to offenses already committed*," and he goes on (page 99) to discuss the question "whether the prisoner can be executed under the provisions of the Revised Statutes which were in force when the crime was committed, and when the trial and conviction took place, but which have since been repealed;" and after the citation of various authorities, showing that, unless the repealing act contains a saving clause in reference to offenses already committed, no conviction can be had therefor under the repealed statute, he proceeds (page 103) to say: "But it scarcely required an examination of authorities to establish a principle so plain, upon reason, as that life cannot be taken under color of law, after the only law by which it was authorized to be taken has been abrogated by the law-making power." True, in that case he finds an additional reason for his conclusion, in the fact that the

repealing law itself expressly provides that offenders in the situation of the prisoner should not be punished under the law which was repealed. The conclusion, however, above announced had been reached independently of this provision. The reference to the provision is as follows: "But if the doctrine [that an offense cannot be punished under color of law, after the only law authorizing the punishment has been abrogated] was less clearly established by reason and authority, it would be the rule to be applied to this case, upon the concession of the statute of 1860 itself. In several of the cases which have been adjudged, and to which reference has been made, the immunity extended to the offender was the result of accident or inadvertence. It was apparent that, if the thought had occurred to the law makers, a saving clause, as to existing offenses, and especially as to prosecutions and convictions which had taken place, would have been added. Here, however, it is entirely clear that it was intended, by the law makers, that offenders in the situation of the plaintiff in error should not be punished under the law which was repealed," and then goes on to quote the section providing that such offenders should be punished "as if convicted of murder under this act."

The conclusion and holding of the court was in accordance with the authorities cited by it, which were approved. A reference to one or two of those authorities will be appropriate, as themselves are authorities upon this question. In *Rex v. McKenzie*, Russ. & Ry. 429, the prisoners were indicted for stealing privately from a shop goods of the value of five shillings. A statute of William III had made this felony without benefit of clergy; but this act was repealed by an act of George IV, which took effect after the offense of the prisoners was committed. The repealing act also provided for the punishment of such offense thereafter committed by transportation for life. The court held "that a conviction could not be had under the repealed statute; and it clearly could not under the provisions of the last act, which was only prospective in its operation." Again, in the *Commonwealth v. Marshall*, 11 Pick. 350, the defendant was indicted, under the statute, against disinterring dead bodies, passed in 1814. This statute was repealed upon a revision of the laws, in 1830. The act charged seems to have been an offense at common law, before either of the statutes were passed. The offense was committed during the existence of the first-mentioned act. The defendant confessed the indictment, and the question was,

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what judgment should be rendered? The opinion of the court was given by Chief Justice SHAW, to the following effect: "The act cannot be punished as an offense at common law, for that was not in force during the existence of the statute; nor by the statute of 1814, because it has been repealed *without any saving clause*; nor by the statute of 1830, for the act was done before that statute was passed. No judgment can, therefore, be rendered against defendant on this indictment."

The case of *Hartung v. The People*, then, may, I think, be considered an authority, in accordance with the line of authorities therein referred to, that an offense cannot be punished under color of law, after the only law authorizing the punishment has been repealed, without any saving clause as to offenses already committed. But if such conclusion of Judge DENIO is merely *obiter*, in that case, the authorities on which it is founded are sufficient to establish the doctrine, which, he says, is so clearly established by reason and authority, and they are conclusive of this case upon the point now under consideration; for if, when one, who had been indicted, tried and convicted before the repeal of the law prescribing the punishment for the offense, could not, after such repeal, be punished, much less could one be indicted, tried, convicted and sentenced, after the repeal of the only law authorizing such indictment, trial, conviction and punishment.

It is insisted, however, by respondent's counsel, that a general saving clause, applicable to this case, is contained in the general repealing act of 1828, and section 6 of that act is cited, which is as follows: "§ 6. No offense committed, and no penalty or forfeiture incurred previous to the time when *any* statutory provision *shall be repealed*, shall be affected by such repeal; except that, when any punishment, forfeiture or penalty shall have been mitigated by the provisions of the Revised Statutes, such provision shall apply to and control any judgment to be performed after said statutes shall take effect, for any offenses committed before that time." 3 R. S. (1st ed.) 155; 1 Stat. at Large, 72.

I confess I am unable to see why this provision does not reach this case. It is general, and in its terms prospective; not referring to the repeals made by that act; for when the effect of such repeals is spoken of, they are indicated as follows: "The repeal of any statutory provision *by this act*," or some equivalent expression, as in the next preceding section: "The repeal of any statutory provision

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*by this act* shall not affect any act done," etc. But here the reference is, distinctly, to repeals thereafter to be made: "No offense committed, and no penalty or forfeiture incurred, *previous to the time when* any statutory provision *shall be repealed*, shall be affected by such repeal."

The language of the section clearly includes and is applicable to this case, and may be paraphrased and applied as follows: "The offense of manslaughter in the second degree under section 1 of chapter 631 of the Laws of 1869, committed previous to the time when said section shall be repealed, and the penalty incurred thereby shall not be affected by such repeal." The exception contained in the section, that "when any punishment, etc., shall have been mitigated by the provisions of the Revised Statutes, such provisions shall apply to and control any judgment to be pronounced, after the said statute shall take effect, for any offense committed before that time," is not inconsistent with the general and prospective effect given to the former part of the section by the above construction, and does not show that such former provision was intended to apply only to the repeals made by that act. In the absence of any authoritative construction to the contrary (and we are referred to none and find none), I think the one above given to the section correct. If neither the offense committed before the repeal, nor the penalty therefor are affected by the repeal, the effect is, that the statute against which the offense was committed continues in effect as to such offense and penalty as though not repealed.

In the case at bar, then, the indictment, conviction and judgment are all right, and there is no ground for reversing the judgment.

The judgment of the court of sessions should therefore be affirmed.

MILLER, P. J., and POTTER, J., concurred.

*Judgment affirmed.*

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PEOPLE *ex rel.* UTICA, CHENANGO AND CORTLAND RAILROAD  
Co. v. HITCHCOCK *et al.*, Commissioners, etc., appellants.

*Railroad aid bonds—authority to subscribe for stock conditionally—estoppel—official bond of commissioners.*

A town authorized the issue of its bonds to the relator, in exchange for relator's stock, upon certain specified conditions. Three commissioners were appointed, and two of them made a subscription for relator's stock, absolute in form, but upon the representation of relator, and their belief that they

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could not be compelled to deliver the bonds of the town until they could make an agreement with the relator, in pursuance of Laws of 1870, chapter 507. Relator did not perform the conditions upon which the bonds were to be issued to it.

*Held*, that the commissioners were not estopped by their subscription, and that relator was not entitled to a peremptory mandamus for the delivery of the bonds.

The offices of commissioners, appointed under chapter 720, Laws of 1873, are not vacated by their omission to make and file their official bonds, until ten days after notice from the supervisor of their town.

APPEAL from an order of special term, awarding a peremptory mandamus, commanding the appellants, commissioners of the town of Pitcher, Chenango county, to issue and deliver to the relator, bonds of their town, in aid of the construction of relator's road, to the amount of \$41,900, or proceeds of such bonds to an equal amount.

The return to the alternative writ was as follows:

"We, Norman P. Hitchcock, D. R. Hakes and William Taylor, do answer and return to the supreme court above mentioned:

"1. That we and each of us entered upon the duties of our office and offices, as commissioners of the town of Pitcher, as above mentioned, without making or delivering to the clerk of said town, or to any other person or officer, any bond or bonds conditioned for the faithful discharge of our official duties, or otherwise, and without making or delivering any official bonds whatever; that we have not, nor has either of us, since being appointed as such commissioner or commissioners, given or delivered any such official bond or bonds; that we have not, nor has either of us, given or delivered any bond or bonds, in pursuance of chapter 270 of the Laws of 1873, or otherwise; that we did not, nor did either of us, know of the passage of said chapter 270, until more than twenty days after its passage; and that we are advised and verily believe that we are no longer commissioners of said town of Pitcher; that we have no authority to issue or deliver the said bonds mentioned in said writ, and that our respective offices have become vacant.

"2. That the town of Pitcher proceeded to the bonding mentioned in said writ, and the tax payers mentioned in said writ made the application to the county judge, and set forth in said writ, and signed the petition in said proceeding before said county judge, mentioned in said writ, upon the express assurance, promise and guaranty of the Utica, Chenango and Cortland

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Railroad Company, its officers and agents, that the bonds of said town should not be delivered to said company, except as follows, to wit: After the road of said company should be completely graded from Cortland to said town of Pitcher, then, as fast and as often as one mile of the road of said company should be graded in said town of Pitcher, and the necessary bridges built, and the same put in readiness for the placing of the ties upon the same, \$5,000 in amount of said bonds should be delivered to said company; when the whole of said road through the town of Pitcher, on or near the line, as now located, should be completed and in readiness for the rolling stock, and a substantial depot constructed near the village of Pitcher, and also a substantial depot on the cross-road at North Pitcher, near the grist-mill, then the remainder of said bonds should be delivered to said company. And the said Hitchcock, Taylor and Hakes allege that the tax payers of said town, signing said petition, believed said promises, assurances and guarantees, and relied upon them, and were induced by them to sign said petition, which they otherwise would not have done; that the commissioners of the town of Pitcher have never refused to issue or deliver to said company the said bonds of said town, upon the terms and conditions above mentioned; that on the 10th day of June, 1873, and before this proceeding was commenced, at Pitcher aforesaid, the said Hitchcock, Taylor and Hakes, as commissioners of said town, offered to execute an agreement with said company, in accordance with the aforesaid terms and conditions, and tendered to the president of said company the draft of a written agreement containing said terms and conditions, and offered to issue and deliver to said company said bonds in accordance therewith, if said company would execute said agreement, or a similar one with said commissioners; but said company, by its president, declined to execute the same, or a similar one with said commissioners; and said commissioners and said company could not agree in relation thereto.

"3. We further allege, that the subscription to said stock, mentioned in said writ, was made by two of said commissioners, on their part, in the county of Cortland, and not in the county of Chenango; that said two commissioners were urged to subscribe for said stock by the officers and agents of the railroad company mentioned in said writ, at the time of such subscription, and were told and assured by them, and by the attorney and counsel of said company, that they, said commissioners, although they should subscribe



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for said stock, could not be compelled to deliver the bonds of said town until they could make an agreement with said company, in pursuance of chapter 507 of the Laws of 1870, and the said attorney and counsel showed said two commissioners a copy of said law, to satisfy them that such was the case; that the said two commissioners believed said representations of said attorney and counsel, and relied upon them, and were thereby induced to subscribe for said stock, which they otherwise would not have done without the execution of an agreement, and the giving of some guaranty on the part of said company.

"4. We further allege, that said Utica, Chenango and Cortland Railroad Company was organized for the purpose of constructing and operating a railroad from Utica to Cortland, through the town of Pitcher and the Otselic valley, and for no other purpose; that such was the promise of the officers of said company at the time the said town of Pitcher and the tax payers thereof proceeded to authorize the bonding of said town in aid of the construction of said road; that all that was done by the said tax payers to authorize the bonding of said town as aforesaid was done with the express understanding and agreement, and on the faith of the promise that said road should be constructed and run as aforesaid, and that there should be an unbroken line of road from Cortland through the Otselic valley and said town of Pitcher to Utica.

"We further allege, that it is now the intention of the officers of said company and those having control of its organization, to construct a road from Cortland to Deposit, or some other point in Delaware county, on the New York and Erie Railroad, which road would not run near or benefit the town of Pitcher, and to consolidate with other railroad companies for that purpose, and that negotiations have been already had and steps taken for that purpose; and that if the said bonds of the said town of Pitcher should be procured by said company, they would be used to assist in the construction of said last-mentioned line of road; and that it is now the intention of the officers of said company, when said bonds are procured, to use them to aid in the construction of said last-mentioned line and not to aid in the construction of the road originally intended, and to aid the construction of which said town was bonded.

"We further allege, that the diversion of the means of said company to the construction of said road from Cortland to Deposit or other point on the New York and Erie road, would, in our opinion,

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so weaken said company that it could not, if it desired to, construct the road originally intended.

"5. We further answer and allege, that it was the express understanding and agreement between said company, its officers and agents, and the tax payers of said town of Pitcher, at the time the proceedings were had on their part to bond said town; that the bonds of said town, or the proceeds thereof, should be used on that portion of the road running through said town of Pitcher; that all the bonds of said town that have been thus far delivered to said company, by any of the commissioners of said town, have been so delivered upon the express agreement made between the officers of said company and the commissioners so delivering them — that said bonds should be so used and not otherwise; but we allege, that it is now the intention of the officers of said company to use said bonds, if they can procure them, to aid in the construction of the line from Cortland to the New York and Erie Railroad, and to procure the rails to lay upon that portion of said line between Cortland and McGrawville, and not to use any portion of same in said town of Pitcher.

"Wherefore, we ask that the court do not compel us to issue or deliver said bonds to said railroad company, but leave said company to apply to the general term of the court, in pursuance of chapter 507 of the Laws of 1870, as amended by chapter 925 of the Laws of 1871."

The case being heard on the return of the writ, a peremptory mandamus was ordered to issue, directing the defendants to issue the bonds in question forthwith to the relator, from which order defendants appealed.\*

*E. H. Prindle*, for appellants.

*R. H. Duell*, for relator.

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\* The following is the opinion delivered at special term:

BOARDMAN, J. Upon return to alternative writ, a peremptory writ of mandamus is now issued to the defendants to issue the bonds of the town of Pitcher to the relators.

This decision is based upon the following conclusions of law, to wit:

1st. The offices of said commissioners are not vacated for the reason that ten days have not elapsed after notice to them from the supervisor of Pitcher, under the law of June 11, 1873. Until they have neglected to file bonds for ten days after such notice, their offices do not become vacant.

2d. Three commissioners having, in fact, united in subscribing for this stock for the town, as appears by the stock subscription now present, they will not now be heard,

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P. POTTER, J. I think the judge at the special term was right in his construction of the act of June 11, 1873, chapter 720, that the offices of the commissioners were not vacated until they had neglected to file their bonds for ten days after notice of the provisions of that act, but I do not concur in the opinion that the subscription for stock by the commissioners is so absolute that it can be enforced in spite of the act of 1870 (chap. 507), and of the amendment of 1873, and that their subscription estops the commissioners from objecting to or questioning the intent to make an improper use by the railroad corporation of the funds to be raised by virtue of such subscription. The statute of 1870 does not limit the time for entering into the agreement between the commissioners with the railroad company, nor is it to be inferred that it can only be made before the subscription is made; but, on the contrary, the power given is expressed in general terms without limitations of time. Besides, the agreement to be made relates to the delivering of the bonds, that is, that the commissioners may enter into a contract or agreement limiting and defining the time when and the proportions in which such bonds or their proceeds shall be delivered, and the places where and the purposes for which the proceeds of such bonds shall be applied or used. The case does not show any unwillingness on the part of the commissioners to make the agreement in accordance with the provisions of the statute, and as they allege in accordance with the previous understanding, but a refusal to act at all and a refusal to deliver the bonds, without any agreement as to the application of the proceeds, or as to the times and proportions in which they shall be delivered. The railroad company claim and the special term held, that the subscribing for the bonds,

as to the time and manner of such subscription, by way of showing that they did not meet and consult together before or at the time of such subscription.

3d. Such subscription, having been made without terms or conditions, is absolute and may be enforced in spite of the law of 1870, ch. 507.

Such law is not applicable to a case where an absolute subscription is made, but only to one where the subscription is founded upon and accompanied by terms and conditions or where there is a refusal to subscribe, for the reason that such conditions cannot be agreed upon.

4th. In like manner an absolute subscription estops the subscriber from objecting to or questioning the manner of the use of the proceeds of such subscription by way of defense to the payment thereof. An improper use of the funds of a railroad company can be stopped, but not by way of excuse for the payment of subscriptions.

5th. Verbal agreements, inconsistent with the absolute subscription to stock preceding or accompanying such subscription, will not be heard to contradict or overthrow such subscription.

For these reasons, a preremptory writ will issue directing and commanding the defendants to issue and deliver said bonds forthwith to the relator.

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without terms or conditions annexed or connected with the subscription, estopped the commissioners from objecting or questioning the use to be made of the proceeds, and from denying the right of the railroad company to demand an absolute delivery of the bonds. This we do not regard as the fair reading, spirit, intent, or even the letter of the statute. The statute seems to have been intended to prevent the fraudulent use or conversion as well as diversion of the funds to an object not intended by the town whose credit has thus been obtained.

The provision is useless if this plain intent can be evaded by such a technicality as that of holding that the commissioners have lost all power to exercise control over the bonds or the proceeds thereof, after a subscription therefor. No language of the statute demands such a construction. And justice and common equity demands that the exercise of a reasonable discretion be continued in the commissioners, until they can make such an agreement as shall protect their town against fraud or imposition in the use of its credit and funds. The order of the special term should be reversed.

MILLER, P. J., and PARKER, J., concurred.

*Order reversed, and motion for mandamus denied.*

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PEOPLE *ex rel.* LASHER *et al.* v. MCNEIL *et al.*, referees, etc.

*Highways—"alteration" of—irregular proceedings.*

The widening of a highway is an "alteration" of it. It is not the "laying out" of a new highway.

Upon a hearing before referees, on appeal from an order of commissioners altering a road, irregularities anterior to the order of the commissioners cannot be considered; nor can such irregularities be considered upon *certiorari* to the referees.

COMMON-LAW *certiorari* to bring up an order of referees, affirming an order of the highway commissioners of the town of Germantown, Columbia county, altering a public highway.

The change was, substantially, by adding two rods additional in width to the former road.

At the hearing before the referees, the relators offered to prove that no legally constituted jury had certified to the necessity or propriety of the proposed widening. That three of the jury were related, within the prohibited degrees, to the owners of the land proposed to be taken. That two of the jury were also two of the applicants. That the order of the commissioners purported to be made at the application of William H. De Witt and others; and that William H. De Witt never signed it. That one of the jury was counsel for the applicants in obtaining the verdict. That the widening of the highway, as ordered by the commissioners, was not the widening as applied for, nor as certified to by the jury. The referees excluded the evidence.

*John Gaul, Jr.*, for relators.

*R. E. Andrews*, for respondents.

P. POTTER, J. We think the proceedings of the referees, in this case, must be affirmed. We regard the case to be an *alteration* of a road within the decision in *Garretson v. Clark, Hill & Denio*, 162. In such a case no jury was necessary, so that all objections made to the composition of the jury are unavailing. The summoning the jury was an act of supererogation, and does not vitiate, even though the commissioners proceeded upon the erroneous theory of believing it necessary.

The six offers of proof made by the appellant to the referees, even if they contained meritorious matter to have in the case, cannot here be regarded as legal error, upon the authority of *Commissioners of Warwick v. Judges of Orange*, 13 Wend. 432, and *People v. Van Alstyne*, 3 Keyes, 37. The other objections made to the proceedings do not seem sufficient to reverse them. We think they must be affirmed.

MILLER, P. J., and PARKER, J., concurred.

*Proceedings affirmed.*

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PEOPLE *ex rel.* TOWN OF ROCHESTER *et al.* v. DEYOE, Clerk of Ulster County.

*Railroad aid bonds—tax payer withdrawing consent given—Laws of 1866, chapter 794—powers of county clerk judicial—constitutionality of acts to bond towns—certificate of consent of tax paying corporation—identity of names.*

Certain tax payers of a town, constituting a majority in number and amount of those whose names appeared upon the last preceding assessment roll, filed with the county clerk their consents to the issue of the bonds of the town in aid of a railroad, under Laws of 1866, chapters 398 and 695, as amended by Laws of 1870, chapter 794, section 4. Afterward, and before the clerk made the affidavit required by the statutes, enough of those consenting to reduce the number below a majority filed their revocation of such consents, and certain other tax payers appeared before the clerk and insisted upon his taking such revocations into consideration, and made certain offers of proof, and certain legal objections. The clerk, however, made his affidavit, holding that he could not take any other proof than the consents.

*Held*, upon *certiorari*, reviewing the proceedings, that the power given to the clerk by the statutes in question, was judicial, and that he should have considered the revocations and received the proof.

*Held*, also, that if the power was not judicial then the statutes conferring it were obnoxious to the provision of the constitution prohibiting the taking of private property without due process of law, and void.

The assessment roll contained the name "President, managers and company of the D. and H. C. Company." One of the consents filed was signed "the D. and H. C. Company, by Geo. Tallbot Olyphant, prest. *p. t.*," attested by a seal and witnessed by "Charles P. Hartt, treasurer." It was acknowledged by Hartt, who, after being described as treasurer of "the aforesaid corporation known and described as the president, managers and company of the D. and H. C. Company," deposed to his residence, "and that he is treasurer of said corporation; that he was personally present at the execution of the above written indenture, and saw the common and corporate seal of the said president, etc., duly affixed thereto, and the seal so affixed thereto is the common and corporate seal of the said, the president, etc., and that the above indenture was duly sealed and delivered by, and as and for the act and deed of the said, the president, etc., for the uses and purposes therein mentioned; that the name of this deponent, subscribed to the said deed as treasurer of the said corporation, in attestation of the due execution and delivery of said deed, is of this deponent's own, proper and respective handwriting; and that the name of George Tallbot Olyphant, president, *p. t.*, of said corporation, also subscribed to the said deed in attestation of the due execution and delivery thereof, was so subscribed in this deponent's presence, and is of the said George Tallbot Olyphant's own, proper and respective handwriting."

*Held*, insufficient, because,

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1. It was not sufficiently shown that either "the president, managers and company of the D. and H. C. Company," or "the D. and H. C. Company" is a corporation.
2. It was not shown that the corporation possessed the power to execute such a consent.
3. Authority to affix the corporate seal was not shown.
4. Authority for the execution of the consent was not shown to have been given by the governing body of the corporation.
5. There was not sufficient evidence that "George Tallbot Olyphant" was the president, nor that the president *pro tem.* had power to execute such an instrument.

A consent by a person whose name differs from a nearly corresponding name upon the assessment roll, though the difference be slight, will be insufficient, unless there is evidence to show that the names represent the same person.

CERTIORARI to review the proceedings of the county clerk of Ulster county, upon an affidavit made by him, and filed in the office of said clerk, under the provisions of various statutes; the first of which is entitled "An act to facilitate the construction of the New York and Oswego Midland Railroad, and to authorize towns to subscribe to the capital stock thereof, passed April 5th, 1866 (chap. 398), and of the several acts amendatory thereto, to carry into effect the purposes and provisions of the said acts. Under the provisions of the amended act of 1870, chap 794, § 4, certain parties being desirous that there should be a branch of this railroad, to be extended from Ellenville, Ulster county, to the Hudson river, commenced proceedings to obtain the consent of a majority of the taxable inhabitants representing a majority of the taxable property of the town of Rochester in said county to that end; and assuming that they had succeeded in obtaining the proper consents, proved and acknowledged in the manner provided by said act, they did, on the 25th day of March, 1872, present the said evidence to the clerk of the county of Ulster, in order to procure the affidavit of the said clerk, proving the fact that a majority of the said tax payers, representing a majority of the taxable property, had been duly obtained, according to the provisions of said act.

Before the clerk made his affidavit, according to the requirements of the said act, forty-six of the persons whose names were subscribed to such consents presented to and filed with the said clerk a paper declaring their withdrawal of said consents, and that they thereby canceled and annulled their consents theretofore given, and giving notice of their opposition to creating any liability upon the town

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for the construction of the said railroad. The signature to these withdrawals was duly verified.

Certain other parties, tax payers of the town, appeared before the clerk, before said affidavit was made by him, and made and filed certain legal objections, and offered to make proof before him of the statements so made, as follows :

"We object to the clerk making the affidavit, or giving the certificate asked for,

"1st. Because the act is unconstitutional.

"2d. The general bonding act repeals the special act under which the town of Rochester is sought to be bonded, and this proceeding should be before the county judge.

"3d. If the clerk entertains the case, we ask for an opportunity to prove that the requisite consents have not been obtained, and that many signatures (enough to reduce the consents below the amount required to bond) were obtained by false representations as to the contents of the papers they signed, and many were obtained by fraud and bribery ; and that the papers submitted furnish no proof that the requisite consents have been obtained.

"That the majority in number of taxable names, and amount of taxable property, has not been obtained.

"That a large number of the tax payers appearing on the last assessment roll of the town of Rochester, who have signed the consent to bond the said town in aid of the New York and Oswego Midland Railroad Company, have withdrawn their consents and given notice of such fact to the clerk of Ulster county, and which names form part of the number now appearing before the clerk to make the majority in number and amount of tax payers and taxable property appearing on the last assessment roll of said town.

"That many persons whose names appear to the petition never signed them nor authorized the same.

"P. CANTINE,

*"Of Counsel for Opponents.*

"ULSTER COUNTY, ss. :

"Lucas Krom, Jr., John D. Winfield, Tunis H. Duryea and Jacob M. Osterhoudt, of the town of Rochester, in said county, being sworn, say, and each says, that he is a freeholder and tax payer of said town, and makes this affidavit to oppose the application now pending before the county clerk ; that John D. Winfield



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is supervisor of the town of Rochester, and have authorized the above objection.

"LUCAS KROM, Jr.,

"J. D. WINFIELD,

"TUNIS H. DURYEA,

"JACOB M. OSTERHOUDT.

"Sworn before me, }  
March 24, 1873. }

"J. M. VAN WAGONEN, *Notary Public.*"

After the filing of these offers, and the objection to the making of the affidavit by the clerk, he returns to the *certiorari* and certifies to this count: "That I declined and refused to take or allow proof to be given under or in support of said objections, for the reason that I considered and held I could not go back of the affidavits and acknowledgments appearing upon or annexed to the consents taken before officers, the signatures of which officers I knew to be genuine, and that I had no power to take proof other than was submitted to me written upon or annexed to said consents."

The other facts material to the case will appear in the opinion.

*P. Cantine* and *T. R. Westbrook*, for relators.

*John Lyon*, for respondent.

P. POTTER, J. The right, or rather the authority, to issue bonds in order to create a liability upon the town of Rochester and upon the tax payers thereof, in aid of the railroad in question, was conditioned upon first obtaining the consent, in writing, of a majority of the tax payers of such town owning or representing (as agent, president or otherwise, including owners of non-resident lands) more than one-half of the taxable property assessed, and appearing upon the assessment roll of the year preceding the date of acknowledging or proving the consents given or obtained. Laws 1866, chap. 298, § 2; Laws 1871, chap. 298, § 2.

These consents are required to be proved and acknowledged in the same manner as conveyances of real estate are proved and acknowledged; \* \* they shall state the amount of money authorized to be raised, etc. And the fact that a majority of the said tax payers, representing a majority of the taxable property, has been

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obtained and acknowledged or proved, shall be proved by the affidavit in writing of one of the assessors of the town (or city), or by the affidavit of the town or county clerk, and shall be indorsed upon or annexed to said written consent; and the said consent and affidavit shall be filed in the town clerk's office of the town, and a copy thereof in the county clerk's office of the county, \* \* and the same, or a certified copy thereof, shall be evidence of the fact therein contained, and shall be admitted in evidence in any court of this State, and of any judge or justice thereof, and it shall be the duty of the said assessors and town and county clerks to make such affidavit when said consent shall have been obtained, as in said section provided. Laws 1866, chap. 398, § 2. By an amendment to this act in the same year, 1865 (chap. 695), the original written consent of the tax payers, proved and acknowledged as aforesaid, are required to be recorded and filed in the office of the clerk of the county, and a copy, duly certified, to be filed in the town clerk's office. Under this amendment the county clerk alone made the affidavit.

The first question raised by the defendants in answer to this writ now is, that upon *certiorari* none but acts of a *judicial* nature can be reviewed, and that the proceedings before the county clerk were not judicial — that the making of the affidavit of the clerk was not a judicial act. The clerk in this case had a duty to perform, as a specially constituted tribunal, by statute. He was clothed by this statute with authority, and was thereby called upon to exercise his judgment and discretion upon the examination of evidence; and, therefore, to determine whether the preliminary acts of the petitioners, required by statute, had been taken; which created the power to bond the town. When he had thus exercised his judgment, and formed an opinion, the making of the affidavit was but the record, expression, or evidence of that judgment and discretion. The exercise of his judgment upon the question whether a majority of the tax payers had given their consent according to law to bond the town, was, I think, in its nature judicial. See *Pierce v. Wright*, 45 How. 7; *Howland v. Eldridge*, 43 N. Y. 460, 461.

It is now well settled that the office of the writ of *certiorari* is to call up for review the proceedings and determinations of inferior tribunals, and it gives authority to review all questions of jurisdiction, power and authority of the inferior tribunal to do the act or acts complained of, to examine the evidence, and to

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examine whether there was competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties had been violated (*People v. Smith*, 45 N. Y. 777), and all questions of regularity in the proceedings to be reviewed — whether the inferior tribunal has kept itself within the boundaries prescribed for it by the statute, or by the principles of the common law. *People v. Wilbur*, 57 Barb. 600; *People v. Board of Assessors*, 39 N. Y. 81; 40 id. 154.

The affidavit of the county clerk shows no other knowledge, in himself, of the number of tax payers, and the amount of taxable property in said town of Rochester, than that which he has derived from the assessment roll of said town for the year 1871, and such as is obtained from the said consents so given to the said borrowing of money on the faith and credit of said town. All which consents, affidavits and city assessment roll are returned with the writ, and are before us for review. The objections now raised are those which appear on the face of said papers, as well as also the papers withdrawing consent, and the objections filed with the county clerk and insisted on before the making of his said affidavit.

The results obtained from the affidavit of the county clerk are, according to his finding, that the whole amount of taxable property of the town of Rochester in the year 1871, appearing on the assessment roll, is..... \$687,710 00

The amount represented by the persons consenting, is \$395,000 00  
One-half of the taxable property is..... 343,855 00

Majority of property consenting..... \$51,145 00

The whole number of tax payers appearing on the assessment roll for 1871, is..... 740

The number who have signed consents is ..... 395  
One-half of 740 tax payers is..... 370

Majority of tax payers giving consent is..... 25

The power of the legislature to pass an act to aid in the construction of such local public improvements as railroads is, it would seem, no longer a question to be discussed in the courts. The creat-

ing of liability to the amount of \$100,000 upon the private property of the tax payers of this town, to aid in the construction of a railroad, it may well be supposed, is greatly obnoxious to a large proportion of the tax payers, and is calculated to provoke such a watchful jealousy by the parties opposed, as to demand that the preliminary steps shall be in strict compliance with constitutional power, followed by a performance of all the precedent conditions prescribed by the statute. It is seen by the statute in question that a way is provided by which individual property of the citizen may be taken from him by first creating a liability thereon, even against the consent of the owner, through the instrumentality of written consents of a majority of the tax payers thereto, and proof that the consents of a majority of such tax payers have been filed and recorded with the county clerk. This proof of filing and recording is now to be made by the county clerk. If this act of the clerk is not judicial, the statute provides none. The constitution of this State (art. 1, § 6) declares that no person shall be deprived of life, liberty or *property, without due process of law*. Is the taking of property in the manner provided in this statute, "*due process of law?*" It was said in the court of appeals, per COMSTOCK, J., in *Wynehamer v. People*, 13 N. Y. 395: "It is plain, both upon principle and authority, that these constitutional safeguards, in all cases, require a *judicial investigation* — not to be governed by a law specially enacted to take away and destroy existing rights, but confined to the question, whether, under the pre-existing rule of conduct, *the right in controversy has been lawfully acquired*," etc.

JOHNSON, J., in the same case, said (p. 418): "Without *judicial investigation*, without due process of law, no act of legislation can deprive a man of his property," and that, in civil cases, "an act of the legislature alone is wholly inoperative to take from a man his property." In *Taylor v. Porter*, 4 Hill, 140, BRONSON, J., in referring to this constitutional provision, said: "The meaning of this section seems to be, that no member of the State shall be disfranchised or deprived of any of his rights or privileges, unless the matter shall be *adjudged* against him, upon a trial had according to the course of the common law. It must be ascertained judicially," etc. \* \* \* "It cannot be done by mere legislation." So, too, in *Embury v. Conner*, 3 N. Y. 511, it was held, that a statute which authorizes the transfer of one man's property to another, without the consent of the owner, is unconstitutional and void, although compensation is

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made. In reference to this same constitutional provision, it was said in *Westervelt v. Gregg*, 12 N. Y. 209: "Such an act as the legislature may, in the uncontrolled exercise of its power think fit to pass, is, in no sense, *the process of law* designated by the constitution." In *Wynehamer v. People*, SELDEN, J., said, in reference to this provision of the constitution: "It must be understood to mean that no person shall be deprived, by any form of governmental action, of either life, liberty or property, except as the consequence of some *judicial proceeding* appropriately and legally conducted."

An act of the legislature of 1862, which authorized the seizure and sale of animals trespassing on private inclosures, or running at large, without judicial process or trial, was held to be a violation of this same provision of the constitution. *Rockwell v. Nearing*, 35 N. Y. 302. These authorities are referred to, because the question has been distinctly raised on the argument, that this liability has been created by an act of the legislature, without providing any *judicial* forum, in which the legality of the proceeding may be questioned by the parties interested. It is insisted on the part of the defendant, which I think was an argument against themselves, that the county clerk was invested with no judicial authority; that his duty in making the affidavit of the existence of certain facts was merely ministerial, made so by statute. On the part of the relator it is claimed that the duty of the clerk was judicial, but if not judicial, that then the act was unconstitutional, for the reason that it provided no judicial forum or body between the legislature and the citizen. The statute is silent as to the powers conferred upon the clerk beyond those mentioned. Nothing is better established, under our form of government, than that the legislature cannot themselves exercise *judicial* powers. They may in certain cases, in this class of cases, declare who may exercise judicial powers, they may confer it upon the county judge, or upon the county clerk, and they may declare what shall be received as legal evidence, but where a statute requires proof of a fact, unless it declare the method of proof, the law requires legal proof. In this case it required only an affidavit. But the making of this affidavit was the final and only determination of the question, whether the consent of a majority of the tax payers representing a majority of the taxable property had been obtained. The clerk is the only officer to whom the writ of *certiorari* will lie. I apprehend it was not the *duty* of the county clerk to swear to consents *if they did not* comply with

every one of the conditions of the statute. If they did so comply, they were then to be *evidence to the clerk*, but only evidence, not conclusive if the clerk was acting judicially; it was then his duty to pass upon the sufficiency or insufficiency of the evidence and of the impeaching or impairing evidence. If these consents were obtained by fraud, by misrepresentation or bribery, then they were not legal consents. If these consents were given conditionally, there ought to be the right to show that the consent was not absolute, and a power to decide upon that right. If these consents are revocable before final action upon them, the revocation ought to be permitted to be shown. That they are revocable has been held in the court of appeals. If none of these things can be shown under the statute in question, if the clerk is a mere ministerial officer, with power only to verify the acts of the party favoring the creation of a debt, without power or authority to recognize or to act upon the evidence of the party opposing its creation, then the legislature must be held to have assumed the exercise of judicial power themselves, or to have delegated to one portion of the taxable inhabitants of a town the power to impose a debt upon the other portion, against their will and without ability to invoke the protection of judicial power in their behalf. Such a construction is inconsistent with constitutional protection, inconsistent with our system of jurisprudence, and inconsistent with the provision in the same act in regard to the consents to be obtained in the *city* of Oswego, where the consents are required first to be obtained by ballot at an election to be held, at which the assent of two-thirds of the voters are required to be had, the election to be held for three successive days; and, after canvass by the proper officers, and a return of the votes to the city clerk, the common council shall then proceed to *determine* whether two-thirds of such votes have been cast for such bonding; and, to make such *determination* final, it is required "to be signed by all the members present, and entered in their minutes." Here is judicial action required for the *city*; it would seem to be equally required for the towns. The act itself does not expressly direct or define the duty of the clerk or how he shall proceed in *determining* the fact whether or not the consent of a majority of the tax payers, representing a majority of the taxable property, has been obtained. If, however, judicial power is conferred upon him by the act, it follows that the authority to act carries with it, by

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necessary implication, the right to examine the evidence offered by the opposing party, and to satisfy his mind *judicially*.

But it is claimed that the constitutional question does not arise and cannot be called in question, as this is the creation of a debt under the *taxing power* which is an exception to the rule, inasmuch as the property is taken for public use. This, if done, would be an exception fairly to be taken, and would have some force if the case comes within the spirit of the law, of the right of taxation for strictly public purposes. This is well-settled law. This was recognized in the late case of *People v. Flagg*, 46 N. Y. 401, that the towns of the State possess such powers in relation to the imposition and collection of taxes as the legislature confers upon them. That was a case for the making and improving public highways, clearly and confessedly a public purpose, and that only; and though it was said in that case that the legislation even in that case was subject to severe criticism in imposing onerous burdens upon the people, against their consent, yet it was held that power for *such* purposes was not restricted by the constitution. But the learned chief justice remarked, "if the object of the expenditures was *private*, or if the money to be raised was directed to be paid to a *private corporation*, who were authorized to use the improvements for *private gain*, the question, in my judgment, would be quite different; and in this respect there is a limit beyond which legislative power cannot legitimately be exercised." This view of the chief justice has since had further expression in the same court in the case of *The People v. Bacheller*, 8 Alb. L. J. 120, which was a case of town bonding for a railroad. In this latter case GROVER, J., after referring to the case of *People v. Flagg*, and the distinction suggested by the chief justice, says: "It is manifest that the question presented in the present case was not determined in that, unless it shall be further held that a railroad owned and controlled by a corporation, and operated by it for the benefit of its stockholders, is a public highway in the same sense as the common roads of the country. The towns through which the latter run may be compelled to construct and keep them in repair for the common use of the public. The substantial question in the present case is, whether they may be so compelled to construct and keep them in repair for the common use of the public. The substantial question in the present case is, whether they may be so compelled to construct and repair railroads, owned and operated by corporations for the benefit of the stockholders.

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The distinction between these two classes of roads is clearly taken and well distinguished in the two cases cited. *Common highways* are public for all purposes; the use is public, and taxation for making and keeping them in repair is entirely within legislative control. Railroads are partly public and partly private. They are for a public purpose, so far as the State grants them the right of eminent domain, to take and condemn real estate for public (not private) use, "but it is equally clear," says Judge GROVER, "that the property acquired by the corporation belongs to it exclusively; and its ownership is as absolute as that of any private individual of property belonging to him. It is also clear that, so far as the road is operated for the benefit of its stockholders, the corporation is *private*." While the learned judge then concedes the power of the legislature to compel towns to construct and maintain improvements of a public character *exclusively*, "yet," he says, "no one would claim that an individual could be compelled by a statute to exchange his note, or bond, or mortgage (and he might have added a pledge of his real estate), with a railroad corporation for its stock, against his will, upon such terms as may be presented by statute." A railroad corporation then, as we draw the rule from these cases, partakes of both characters, public and private—*public* as to its franchise, *private* as to its ownership of its property and its relations to its stockholders. The bonding of the town is for its private use. These are the most modern views of the court of highest authority in this State, and though they do not go to the extent of holding to the invalidity of laws for bonding towns; it is clearly to be seen that laws for this purpose are to be looked upon with great jealousy; that they do present questions of grave importance, inasmuch as upon their validity may depend the creation of a debt against a town to the extent of twenty per cent of all the taxable property of a town, against the will of a large proportion of its tax payers; the avails of which debt is for the *private* use of the stockholders of a corporation. It is sufficient for us in this case to hold that a statute conferring such power, so seriously affecting the natural rights and pecuniary interests of the citizens, should only be permitted to be carried into effect by the strictest conformity to the spirit and intent of the statute, and such statute should be held to be clearly within the constitutional limits. In the language of ALLEN, J., in *People v. Smith*, 45 N. Y. 781, "nothing can be taken by implication, and



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the act, as it imposes a burden upon the public, and in a manner deprives the owner of a full control and disposition of his property, by giving to others the power to incumber it, should be strictly construed in favor of the rights of property." \* \* \* "It is the right of every one, until *legally* deprived of that right, to determine for himself to what extent his property shall be expended or incumbered for such a purpose," etc. It is seen that the acts in question in this case give to the affidavit made by the county clerk the effect of a judgment of a court of record. It is the last final act prior to the issuing of bonds which, of themselves, create a public debt upon the town, and impose upon the local government the duty to raise money by tax to pay the same, with interest thereon. If, then, no judicial authority is created by this act, before which the citizens may test the integrity of the proceeding which may impose upon him this burden of debt, if he is not allowed his day in court; if this statute in its provisions proposes to work a change of property from one individual to a corporation, without the aid of a court or judicial magistrate; if, indeed, it is as claimed that this statute, by its own inherent force from the legislative power, extinguishes the rights of the citizen to a portion of his property and transfers it to another without judicial action of some kind, without due process of law it comes directly in conflict with the constitution.

Having already intimated that the acts in question did confer upon the county clerk a quasi-judicial power; and acting upon this assumption, I think the clerk erred in refusing and declining to take or allow proof to be given in support of the objections of the opponents of the said bonding, and in refusing to regard the affidavits of the tax payers of the said town, filed in his office in opposition thereto, and in refusing to consider or to allow the withdrawal of the consent of said tax payers filed in his office, and in deciding and holding that he had no power to take other proof than that of the contents filed in his said office in favor of said bonding, and the acknowledgments written upon such contents.

But if we are wrong in our views upon the construction of the constitution, and of statutes passed for this purpose, I think there is not sufficient legal evidence appearing upon the consents of taxable inhabitants of said town filed, to prove that a majority of such tax payers, representing a majority of the taxable property of the

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town, had given their consent. Among these petitioners consenting, is "The Delaware & Hudson Canal Company," represented upon the assessment roll by the title, "*President and Managers of the Delaware & Hudson Canal Company*," as being assessed for real estate to the amount of \$250,620. The petition in this case is signed "The Delaware & Hudson Canal Co., by Geo. Tallbot Olyphant, president *pro tem.*; attested by a seal, and witnessed, "Charles P. Hartt, treasurer." The acknowledgment is made before a notary public by the witness, Charles P. Hartt, who deposed to his residence being in the city and county of New York, "and that *he is treasurer of said corporation*; that he was personally present at the execution of the above *written indenture*, and saw the common and corporate seal of the said *President, Managers and Company of the Delaware & Hudson Canal Company* affixed thereto, and the seal so affixed thereto is the common and corporate seal of the *President, Managers and Company of the Delaware & Hudson Canal Company*; that the above written *indenture* was duly sealed and delivered by, and as and for the act and deed of the said, *The President, Managers and Company of the Delaware & Hudson Canal Company*, for the uses and purposes therein mentioned, that the name of this deponent subscribed to the said deed as treasurer of the said corporation in attestation of the due execution and delivery of said *deed*, is of this deponent's own proper and *respective* handwriting; and that the name of George Tallbot Olyphant, president *pro tem.* of said corporation, also subscribed to said deed, in attestation of the due execution and delivery thereof, was so subscribed in this deponent's presence, and is of the said George Tallbot Olyphant's own proper and *respective* handwriting."

The statute requires that these consents shall be proved or acknowledged in the same manner as conveyances of real estate are proved or acknowledged. This acknowledgment is defective in several particulars. The county clerk received it as good and sufficient. There is no evidence that the petitioner, "The Delaware & Hudson Canal Company," is a corporation. If we may infer, from the proof of the acknowledgment, without other proof, that "The President, Managers and Company of the Delaware & Hudson Canal Company, who made the acknowledgment, is identical with "The Delaware & Hudson Canal Company," there is still no legal proof that either is a corporation, except it is to be *inferred* from

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the proof before the notary public, that the seal affixed to the consent is the common and corporate seal of "The President, Managers and Company of the Delaware & Hudson Canal Company." The existence of a corporation was in no other manner proved. This is necessary. *Lumbard v. Aldrich*, 6 N. H. 269; 7 Conn. 219. Authority was shown that the corporation possessed the power to execute such a consent. This was necessary. The affixing of a corporate seal to an instrument requires an express authorization for that purpose. *Johnson v. Bush*, 3 Barb. 239, 240; *Hoyt v. Thompson*, 5 N. Y. 320; *Worrall v. Werner*, id. 229. 6 Serg. & Rawle, 12. The affixing of a corporate seal to an instrument, even where the officer affixing it is trusted with its custody, is not even *prima facie* evidence of his right to fix it to the particular instrument. This fact is necessary to be established before the officer who takes the acknowledgment. *Johnson v. Bush*, *supra*. There is no evidence that any resolution had been passed by the corporation to authorize the execution of such an instrument, or any instrument. This is necessary. See authorities, *supra*. There is no evidence that George Tallbot Olyphant is an officer, or even a member of the corporation. There is no evidence that he is the president. His signature, "*prest. p. t.*," does not prove it, but the contrary. If we may assume that these abbreviations express or represent that he is the president *pro tem.*, there is no evidence that the president *pro tem.* has any authority to act, and it does not prove the absence of the real president. He is not shown to have the custody of the seal, or the right to use it, and the "*using it for the purpose therein mentioned*" does not prove it to be the purpose of the corporation. It may be only his own individual or private purposes. Neither president or other officer of a corporation have power to do any act requiring the use of the corporate seal, without the assent and authority of the board of directors. *Hoyt v. Thompson*, *supra*, 320, 334. The modern cases in the court of appeals enjoin upon us the necessity of construing these statutes, which have for their object the divesting of the citizen of his estate against his will, with a jealous watchfulness, and to give them that strict construction which is given to all statutes which are in derogation of the natural rights of the citizen, statutes which confer extraordinary power upon specially constituted tribunals, and which impose burdens upon the public

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to favor corporations. A statute which thus deprives the citizen and the public of the ordinary safeguards of protection to rights of property in the ordinary courts, and deprives them of all opportunity of a judicial hearing and defense, is greatly obnoxious to a fair system of jurisprudence. I am, therefore, of opinion, that the *consent* of this corporation, if it be one, or of this tax payer, by whatever name or title it may appear upon the assessment roll of the town of Rochester, was not obtained according to the provisions of the statutes in question. See *People v. Smith*, 45 N. Y. 772; *People v. Hulbert*, 46 id. 110; *People v. Knowles*, 47 id. 415. If we are right in this view of construction, and as to the defect in this consent, the proceeding must be without jurisdiction. The amount of this assessment alone exceeds nearly three times the amount of property claimed to be in favor of creating the liability, and for this objection alone, the proceeding might be declared null and void. But this case is not the only one found to be defective in its non-compliance with the demands of the statute, as interpreted in the last three cited cases. Fifty-eight names are found upon the assessment roll, and which are counted as names giving their consents, which do not correspond with the names signed to the consents themselves, the difference being by the addition or omission of one or more middle letters in the name, or such an entirely different spelling of the name as to create uncertainty as to the identity of person, and an entire omission of proof of the *identity* of the person. The differences between assessment roll and consent are as follows, to wit: Maria B. Broadhead, with Maria Broadhead; Simon Bush, with Simon D. Bush; Barnus Cross, with Barney Crosse; Jacobus V. Coddington, with Joshua V. W. Coddington; Benjamin Collier, with Benjamin S. Calier; Maria Davenport (wid.), with Mary Davenport; William Dann, with William F. Dan. Affidavit proves the consent of William T. Dunn — James Dunn, with James T. W. Dunn; Thomas McDonick, for Thomas J. McDolen; John T. Osterhout, with Jonathan Osterhout; Isaiah, for Isaac; George Schoonmaker, with A. S. Schoonmaker; Stephen V. Warrens, with S. V. R. Wands, etc., etc. These names cannot be allowed as the same names without proof of identity. If disallowed, as they should be, by the rule (*People v. Hulbert, supra*), then the proceeding is void, for want of jurisdiction in obtaining a majority of names.

There are various other technical objections, some of which seem

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also to be good, but I regard those already reviewed as sufficient to justify a reversal of the proceedings, with costs.

MILLER, P., J. and PARKER, J., concurred in result, except as to the allowance of costs.

*Proceedings reversed.*

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ARMSBY *et al.*, plaintiffs in error, v. PEOPLE.

*Criminal law — trial — persons jointly indicted — qualifications of juror — evidence.*

Where four were jointly indicted for felony, *held*, that three of those indicted had no right to require that the fourth should be tried jointly with them.

Upon a challenge to a juror for principal cause, it appeared that he had owned a farm; had conveyed it away "last spring," and did not then own any real estate. He had taken back a mortgage, but could not tell, of his own knowledge, that he was assessed "this year" for any personal property. He had not been so assessed the preceding year, but had then been assessed for real estate. The trial took place in June. The court sustained the challenge. *Held*, no error.

Upon an issue as to the identity of the defendants with persons who had committed a larceny, it appeared, that while two of such defendants were under arrest, the complainant said that one of them was the man "who had scooped in his money," and the other was the man who had introduced a game of dice (during which the larceny was committed), and they made no reply. He then said, that another had represented himself as city attorney, and then both of the prisoners spoke up and said he was mistaken, and that that man was a stranger, who had just dropped in. Money had already been found on one of the prisoners, which corresponded somewhat with the money which had been taken from the complainant. This evidence was admitted by the court as against the two defendants, in whose presence it occurred. *Held*, that the evidence was admissible.

THIS is a writ of error to review a judgment and conviction of the Albany oyer and terminer. The plaintiffs in error were convicted of grand larceny. The indictment was also, jointly, against one James Mulhall, who has not been arrested, and James Palmer, *alias* Davis, not tried. The larceny charged, was the taking from the possession of one Job H. Reynolds, a stranger, who arrived in Albany, in April, 1873, about \$300 in money, and a gold watch, of the value of about

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 80. Three of those indicted were tried, convicted, and sentenced to the penitentiary, two for three years each; the other for two years. The testimony is voluminous. So much only as is material will appear in the opinion.

*R. W. Peckham*, for plaintiffs in error.

*N. C. Moak*, District Attorney, for people.

P. POTTER, J. The undisputed facts are, that the complainant, Reynolds, from Michigan, an elderly man, arrived in the city of Albany, in the afternoon, and toward evening, went to the steamboat *Drew*, purchased a ticket, and checked his baggage for New York. While sitting on board of the boat, a stranger made his acquaintance, and inquired the place of his residence, and being informed that it was Michigan, this stranger informed him, that a man from Michigan had been, that afternoon, killed on the railroad, and invited him to go down and see if he could not recognize him. They went together, along the dock of the river, as far as Maiden lane, and finding no dead man, this stranger then said, he guessed they had taken him away; and then invited Reynolds to go into a saloon, and have a glass of beer. The stranger treated him, and then he treated the stranger. While they were drinking, Kelly, one of the plaintiffs in error, came down stairs into the saloon, and Kelly and the stranger commenced throwing dice for beer; Armsby, with several *aliases* (whom we shall hereafter call Armsby), was the bar-tender of the saloon. While they were playing dice, Clune (with an *alias*), another indicted party, and Mulhall (who has escaped arrest), came in. Reynolds was invited to join in throwing dice; he protested, plead ignorance of the game, and it is not quite certain, whether or not, he joined in throwing dice. Mulhall claimed to be city attorney. Reynolds, about this time, began to think he was in a bad place; took out his money from a sack, inside his vest, to pay for his beer, and as he commenced to open it, Armsby seized it, and went to the end of the counter with it; and then the whole party, *five* of them, huddled together, around Armsby, at the end of the counter. These five were *Kelly, Armsby, Mulhall, Clune* and the stranger. The next that Reynolds observed, was that the stranger had slipped out; in half a minute, Kelly also slipped out. He (Reynolds) then found his watch was gone

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also. He began (he says), to make a fuss, and they stepped up and said, if I would keep quiet they would get my money for me. Mulhall said, he would get my *watch* for me, if I would sign a paper. Mulhall said he was a city attorney, and Clune said he was a detective. He (Reynolds) signed a paper; is not certain what it was; was called a receipt. Kelly then gave Mulhall the watch, and Mulhall gave it to Reynolds. Clune then went with him to the steamboat, as he pretended, to search for the stranger, whom they did not find. Reynolds, seeing a policeman there, asked him if Clune was a detective, and he said no, and Reynolds then told the policeman to arrest him, and he did so. This policeman was officer "Deitz." Deitz then got another officer, "Sullivan," to help him. While Reynolds was at the boat, he also saw Mulhall, and told Deitz "there is another of them." Reynolds then went to the station-house, and there he found Clune, Kelly and Armsby, and recognized them to the police officers. On searching Armsby, the money of Reynolds was found and identified.

The theory of the prosecution is, that these three plaintiffs in error, with the other two indicted persons, were all conspiring, aiding and abetting in this larceny, and by a conspiracy of intent, and action, each performing his somewhat different part, as to time and place, but with one common design, participated in the commission of this larceny.

The plaintiffs in error rely chiefly upon errors occurring upon the trial, for a reversal of the conviction and judgment. These claimed errors are numerous; some of them are urged with great force, and are close questions of law, and in some of them, the criminal law of different States seem to be somewhat in conflict. We shall best dispose of them by examining them in their order.

1. One of the parties indicted was one Davis (*alias* Palmer), who, on a former day, had demanded a separate trial, and it was granted him. The trial then proceeded against the three plaintiffs in error, but the jury failed to agree. The trial was then again moved, and then the plaintiffs in error demanded that Davis should be tried with them, as his name was also included in the indictment. The district attorney thereupon moved that the defendant Davis have a separate trial. The court held, that the defendants, if they demanded it, might have separate trials; if they did not demand it, as the district attorney had moved that the three defendants, Clune, Armsby and Kelly, be tried separately from Davis, that such

motion was within the discretion of the court to grant. The court did grant it, and the counsel for the three defendants excepted. I think there was no error in this ruling. No such right, as was demanded, is secured by statute. The only regulation the statute has made, is that of 2 Revised Statutes, 735, § 20, as follows: "When two or more defendants shall be jointly indicted for any felony, any *one* defendant, requiring it, shall be tried *separately*. In all other cases, defendants, jointly indicted, shall be tried separately, or jointly, in the discretion of the court." This was not an application by one for a *separate* trial, but an application by *three* to have a *fourth* tried *jointly* with them. Prior to this statute, it was not even the right of *one* defendant to have a separate trial, but was matter of discretion with the court. *People v. Williams*, 19 Wend. 377; *Commonwealth v. Robinson*, 1 Gray, 560. This demand of the three was in violation of the statute right of one.

2. In impaneling the jury, one Perry, called as a jurymen, was challenged by the defendants for principal cause. On being examined, it appears that he had been a farmer; had sold out his farm last spring, and had no title to any real estate at the time of his examination, and could not tell, of his own knowledge, that he was assessed *this* year for any personal property, was not assessed last year for any personal property, but was for real property. He gave a deed last spring, and took back the mortgage. The challenge was then withdrawn by the defendants, and renewed on the part of the people. The same evidence was repeated. The defendants then claimed that the juror was competent. The district attorney objected that the juror was not assessed for personal property. The court sustained the challenge, and the defendants excepted. There may be a little ambiguity in the meaning of the statute as to the competency of this juror. He was a competent juror when his name was selected by the town officers; not, as we must assume, because he was assessed for personal property, for he was not, but because he owned real estate of sufficient value for that purpose. When he sold this real estate, and until he acquired more, or, until he was assessed upon personal estate to the value of \$250, he did not possess such qualifications as authorized the town officers to select him as a juror. 2 R. S. 411, § 13. But the question here is, having had his name once selected when he was qualified, and his name still remaining in the jury list, and in the box to be drawn from, is he *then* exempt or disqualified from serving? If he has personal prop-



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erty of the value of \$250, and is not, *at the time*, assessed for it, he has not the qualification that constitutes him a juror to be selected by the town officers. If he does not possess these qualifications, and, notwithstanding his name is found in the box, and he is drawn as a juror, the statute then directs the court to discharge him from such service. 2 R. S. 415, § 33. The ambiguity arises between the 13th and 33d sections. Does the 33d section, then, make it imperative upon the court to discharge the juror if he is the *owner* of personal property of the value of \$250? Thus it reads: "The court shall discharge any person from serving on a jury in the following cases: 1. When it shall satisfactorily appear that such person is not, at the time, the owner in his own right, or in the right of his wife, of a freehold estate in real property, situated within the county, of the value of \$150, *and* is not the owner of personal property to the value of \$250." *Shall* the court discharge when the juror does not thus possess *both* real and personal? or, should the court refuse to discharge if he possesses certain real or personal property to those amounts? What is the power of the conjunction "*and*" in this sentence? Is this 33d section to be read in connection with section 13, and so construed together, as that in section 33 the personal property therein mentioned must be *assessed* property? I admit there is some obscurity in the expression of intent.

Whatever may be the true construction of this statute, the decision of this case, I think, does not depend upon the ruling of the judge upon this point. The defendants had no such vested right in this juror as to make his rejection error. They were tried by twelve unobjectionable jurors—competent jurors—against neither of whom they urged any objection. It is unlike the case of being tried by one objectionable juror, who sat by reason of a ruling that he was competent. There can arise no intendment of error against the defendants when tried by a competent jury—no presumption that they have been prejudiced. It is obvious that the ruling, even if it is technically error, worked no injury or injustice to the defendants on the trial. *People v. Gonzales*, 35 N. Y. 60. I do not see that the act of 1873 (chap. 427) works any change in the former statute or in the common law in this regard. It merely changes the trier, and provides the manner of review.

3. The next point in the order of the case to which objection is raised, is the ruling of the court in the admission of evidence of the declaration of Reynolds, the complainant, in the presence of

two of the defendants, Kelly and Armsby, and the silence of the defendants as to what was said on the night of the larceny in question. After the arrest of Clune by direction of Reynolds, Reynolds was taken to the station-house, where Kelly and Armsby were also brought, under arrest. The district attorney asked Reynolds, on the trial, what the officers said to him and what he said to the officers about the money he had lost there in the presence of the defendants.

The defendants' counsel objected to this evidence, *first*, as incompetent and immaterial; and, *second*, upon the ground that it appears that the defendants were then under *arrest*; and to any thing as to the conduct of the defendants there at that time; and also, on the ground that it was the declarations of the witness. The testimony was offered as to Kelly and Armsby alone. The court admitted the evidence, and the defendants' counsel excepted. The same offer of testimony was repeated, referring to the same occasion, when two of the police officers were testifying at a later stage of the trial; the same objections were made, the same ruling had, and the same exceptions. The objections may all, really, be considered together as one point, and all, as involving the same legal question, be discussed together. This seems to be regarded as the main point in the case. The soundness of a ruling at a trial essentially depends upon the particular circumstances which appear, or which are given as the theory of the case. It frequently occurs that the admission of evidence is upon a theory, which, if not sustained, makes the testimony in the end improper, and demands its being subsequently stricken out, with proper instructions then to the jury in regard to it. So, too, it often occurs in practice, that testimony is admitted which is technically illegal at the time, but the illegality is cured during the trial by other evidence. The propriety of the testimony so admitted in this case, as in most others, must be determined by the surrounding circumstances. It appears that the complainant was a stranger in the city; had been beguiled by a stranger into a place of doubtful repute; had found there an association of men, acquaintances of each other, and had been robbed, by force, of his money and watch; and though they all seemed to be acquaintances and to know by whom and by what means he had been robbed, none volunteered to communicate to him the truth. Some quietly and secretly departed; others, acting with the false pretense of being of the police force, the one city attorney, another a detective, after the robbery, were luring him on, under the pretense of aiding him to find the thief. This was

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the theory of the prosecution, under which the evidence was offered, and as it turned out, was the truth of the case. Suspecting the fraud, the complainant caused the counterfeit detective to be arrested, and gave such information as caused the arrest of two of the associates also. It was as to the occurrences at this period, at the station-house, in the presence of Kelly, who had had his watch, of Armsby, the bar-keeper, who had stolen his money, and of Clune, the pretended detective, that the following proposed inquiry related: "What was said by you about the money you had lost there in their presence?" Ans. "I told the officers who were there what amount of money I had lost" in their presence. "I said I had \$300; and \$50 was on a Baltimore bank, and I had four (\$20) twenties, and four (\$10) tens, and the rest in (\$5) fives, and the \$75 was in gold." At a later stage of the trial, one Doran, connected with the station-house, was examined as to the same occurrence at the station-house in the evening of the day of the larceny, at the time Kelly, Armsby, Palmer and Clune were present. To the question by the district attorney, "State what occurred there so far as Reynolds and the defendants were concerned? Confined to Armsby and Kelly. Ans. "They were brought into the station-house; Reynolds was in a chair, sitting there. I believe Reynolds was asked whether those were the parties. I believe he said Armsby or Brooks, which is the same man, was the man who had scooped his money in; and he said Kelly was the man who had introduced the game of dice; he said Palmer was the man who represented himself as city attorney." Q. "What then, about the money he had lost?" Ans. "They were searched; money was found on them, in all \$295.05; it was in separate packages." \* \* Q. "What did he (Armsby) say about mixing the money?" Ans. "He said he did not want the money mixed; he said some of it was bar money, that was the lesser package; the larger one was wrapped in tissue paper." Q. "Did he say where the other came from?" Ans. "No; I do not think he did." \* \* \* Q. "What reply did Armsby make when Reynolds said he was the man who scooped in his money?" Ans. "I do not know as he said any thing that I remember of." \* \* \* Q. "What did Kelly say when Reynolds said he was the man who introduced the dice?" Ans. "I do not know as he said any thing that I can remember; not any thing that I know of."

Michael Ryan, a policeman, present at the same time as a witness, was asked the same questions, and his testimony is the same as that

of the preceding witness, in substance and effect. He added, "that on search, there was a \$50 bill on a Baltimore bank; three or four \$20, some \$10, and the balance in \$5 bills. Armsby did not want them mixed; that the smaller package was the bar money; the big one was wrapped up in tissue paper." Robert Davison, captain of the police force, and Barnett Gelan, a sergeant of the same force, were also sworn, and stated that they were present at the same interview at the station-house, and they testified to the same facts as the other witnesses with but slight variations, and with no conflict. Captain Davison, when testifying to the identification by Reynolds of Armsby, Kelly and Palmer, on the cross-examination by defendants' counsel, in answer to a question, testified as follows: Q. "Kelly and Armsby did say something to Reynolds about Palmer, when Reynolds said Palmer was the city attorney?" Ans. "Yes; they both said he was mistaken; *they* said *he* (Palmer) did not belong there; that *he* simply dropt in there." Ryan, the witness, also corroborates this testimony; he said, "they told the old man he was mistaken" (referring to his identifying Palmer as city attorney). To all this testimony, except that called out by himself, the defendants' counsel not only objected to its being given, for all the reasons stated by him when it was offered, but excepted to the rulings which admitted it, and also made a motion to strike out the evidence as to Armsby's silence when Reynolds charged him in the station-house with being the man who scooped in his money; which motion was denied, and to which denial there was an exception. Besides this, the defendants' counsel requested the judge to charge the jury that the fact that Armsby remained silent, when Reynolds pointed him out to the officer as the man who took or scooped in his money, furnishes no evidence against Armsby, and that the jury have no right, from that fact, to indulge in the least presumption against him. He also made the same request as to Kelly's silence, when Reynolds pointed out him as the man that introduced the game of dice. These requests the court severally refused to charge, and the counsel severally excepted.

This statement presents the whole legal question, as to whether silence can be given in evidence against a party charged with the commission of crime, or, as to his identity, in cases where identity is the material question; and if admissible, when, and under what circumstances. These questions we will consider.

There can be, I think, no unvarying rule, that can be applied to

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all cases, under all circumstances. There are cases, where silent acquiescence of a party, in the statements of others, made respecting himself, made in his presence — statements injuriously affecting his rights or interests, will amount to an implied or presumptive admission of the truth of the statement. This is based upon the old maxim, “that he who is silent is supposed to consent.” The case of *Jewett v. Banning*, 21 N. Y. 27, was an action for assault; the plaintiff charged the defendant with it, and he denied it. Three-fourths of an hour afterward, the plaintiff charged the defendant with it again, with some variations, in the presence of other witnesses, and he did not deny it. The judge submitted this question of silence to the jury, to give such weight to it as, under the circumstances, it might be entitled to. A judgment for the plaintiff was affirmed, and the charge held not to be error. In the case of *Fenno v. Weston*, 31 Vt. 345, it was held, that the omission of a party to reply to the *statements* in a letter, about which he has knowledge, and which, if not true, he would naturally deny, when he replies to other parts of the letter, is evidence tending to show that the statements so made and not denied are true. So if he wholly omits to answer such letter. *Id.* In *Coe v. Hutton*, 1 Serg. & Rawle, 398, it was held, that a *cash* account, shown to the defendant, and not objected to by him, was evidence, upon which the jury, under all the circumstances of the case, might decide. In *Vincent v. Huff*, 8 Serg. & Rawle, 388, it was held, that a party who paid another fifty pounds, and said at the time “*this is the amount of*” (T. a piece of land) “*it is mine now*,” is evidence, if not contradicted, and affords ground of inference, that the whole purchase-money was paid. In *Jackson v. Winchester*, 2 Yeates, 529, on a motion of a defendant to be discharged on common bail, a witness swore to certain facts in the presence of the plaintiff. The witness died before trial. On the trial the defendant offered these facts so sworn to in evidence. The court held, that what the witness so swore to stood precisely on the same footing as declarations *in pais*, in the presence of the party, and where the plaintiff was silent, the maxim “*qui tacet consentire videtur*,” is applicable, and the jury will judge of it, under all the circumstances of the case. The same rule in this regard is applied in criminal as in civil cases. 1 Phil. Ev. 390. The case of *Rex v. Smithies*, 5 Car. & P. 332, was an indictment for murder, by setting fire to a house. On the trial it was proposed to prove what the prisoner’s

wife said to him on the subject of the fire, to which he gave no direct reply, or an evasive reply. This evidence, though objected to, was allowed by the court, as evidence of an implied admission. In a subsequent case of *Rex v. Bartlett*, 7 C. & P. 832, also a case of murder, while the prisoner was in custody at the time, or before his examination before the magistrate, the wife came in and said: "Oh, Bartlett, how could you do it." He looked steadfastly at her and said: "Ah, what! you accuse me of murder too." "I do, Bartlett, you are the man that shot my mother." The prisoner did not make any reply. She turned to the witness and said: "This is done for money." This evidence was permitted to go to the jury. See, also, *Jewett v. Banning*, 21 N. Y. 27. The elementary works on criminal law seem to have adopted this view of the practice as sound, and they have cited these same authorities as above to sustain them. See Roscoe's Crim. Ev. (3d Am. ed., by Sharswood) 56; Burrell on Circumstan. Ev. 482; Best on Presumptions, § 242; 2 Starkie's Ev. 26; 1 Phil. Ev. (3d ed.) 400; *People v. Green*, 1 Park. Cr. 17. My own view as drawn from all the cases is, that there is no absolute rule. That much is left to the judge's discretion, and which should be controlled by the surrounding circumstances, by whom the declaration is made, to whom it is made, and whether the parties possess a knowledge of its truth; whether made during a judicial proceeding, whether is acting under excitement or fear, etc.

The defendants' counsel insists, that though the evidence of silence in such cases may sometimes be received, it can only be so received when the following conditions exist, viz.: 1. In cases where it would be *natural* and *appropriate* for the accusing party to make the accusation. Substituting for "accusation" the word "charge," or "remark," there would be no objection to the allowance of such a condition. Nothing could be more *natural* or *appropriate* in its application to the case before us, than that the victim of the larceny, when brought into the presence of the parties, should point out to the officers the persons charged, and declare as to each, the part taken by them in the crime. 2. "That the accusation should be made in the presence of and addressed to the party accused." In this case it was made in the presence and hearing of the parties accused; it may have been, but it was not necessary under the circumstances of this case, that the charge should be made exclusively to the party accused. 3. "It should naturally and properly call for a reply from the party accused." There is no objection to such a con-

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dition. 4. "That the party thus accused should not, at the time, be under arrest, in the presence of officers, charged with the crime." This last condition is not the rule, as I understand it. That a party is under arrest does not render his declarations or acts inadmissible. *People v. Wentz*, 37 N. Y. 303; *McKee v. People*, 36 id. 116; *People v. Green*, 1 Park. Cr. 17.

The learned counsel for the defendants cites various English and American authorities, to show that silence of a prisoner before a magistrate, or other officer, or while under arrest, then being charged with the commission of a crime, is inadmissible. The rule claimed by the counsel is not as broad as he claims it, nor are the cases cited at all in conflict with the rule we have above supposed to be the true one. There is a class of cases, among them those cited by the defendants' counsel, where the silence of a party is not, and ought not, to be evidence against him, where the statement is made by a witness in a *judicial proceeding*. A witness may swear to statements directly charging crime or liability against the party, and the silence is then a duty of the party. The rising up to make denial in such case would be an impropriety, if not a contempt of court. So, where a witness is swearing against him before an examining magistrate on a criminal charge, it does not demand a denial; nor does his silence in such case amount to evidence against him. Any number of cases can be supposed, especially in judicial proceedings, where silence is a propriety as well as a duty. The distinction between all such cases, where he is acting under judicial restraint, and those in which the admission, express or implied, is voluntary, as well as in the cases in which silence is a duty; and those where silence may be appropriately construed into an admission of assent to the charge, requires no remarkable acumen to determine. In the one case it is his duty to be silent, in the other to speak. Among the former is the case of *Sheridan v. Smith*, 2 Hill, 538, where the testimony of a witness in another case, in which the plaintiff was a party, was offered on the ground that the plaintiff was a party. Such, also, was the case of *Rex v. Appleby*, 3 Stark. 33, where it was offered to be proved that on an examination before a magistrate, of one of two prisoners, one was sworn, and testified to having committed the felony jointly with the other. So, too, the case of *Melen v. Andrews*, 1 Moody & Malk. 336. In that case the judge laid it down as a rule, "that the deposition of a witness taken in a judicial proceeding, in the presence of

the party charged, is not admissible in another proceeding against that party, on the ground that he was present, even though he had the opportunity of cross-examination. The judge remarked, "that he was prevented from interfering in such case; as he would not be in a conversation; that the same inferences cannot be drawn from his silence or his conduct, as in that of a conversation in his presence."

The question in *Rex v. Swatkins*, 4 Car. & P. 548, was decided upon another principle: that was an offer to prove the declaration of a prisoner, made in the presence of an officer in whose custody he was. This was denied, on the ground that it should be first shown that the officer had held out no inducement to the prisoner to make the confession. This case has no application. The defendants' counsel cited one other English case (*Child v. Grace*, 2 Carr. & P. 193), which was an offer to prove what the magistrate said, before whom a matter had been investigated, in the presence of both the parties. It does not even appear from the case, except inferentially, that the parties remained silent, but the judge, Ch. J. BEST, said: What was said "by a third party to the plaintiff is not evidence." The additional remark made by the judge in the same case proves too much for the defendants' case, viz.: "If that which was said drew any answer from the plaintiff, then that makes it evidence, otherwise not." I understand the rule to be, that if the statement of one person call forth a reply from another, such statement, in conjunction with the reply, may be given in evidence against the party replying. And in such case it makes no difference by whom the words were spoken which call forth the reply. It will appear in the case at bar, in the evidence of Captain Davison of the police, and of one other policeman, that at the station-house when Reynolds was pointing out the defendants to the officers — Armsby as the man who scooped in his money — and Kelly as the man who introduced the dice, and making the declarations proved — no reply was made by either of them, as to the charge against themselves, but when he pointed out Palmer as the pretended city attorney, both Armsby and Kelly replied, by saying, "he was mistaken," "he (Palmer) did not belong there; that he simply dropped in." This is the strongest implication that he was right as to them, but wrong as to Palmer.

If this is a fair inference, then the cases cited for the defense fail to show error upon this point. And even if the admission of the evidence complained of was error, when admitted, it was



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cured by this evidence of the declarations of these two defendants, as to them. There was no judicial proceeding going on. The pointing out of the criminals was a part of the *res gestæ*. What the complainant said beyond this, was the imputation of a criminal charge; a statement injuriously affecting the reputation of these two parties; a statement which, if received in silence — not replied to — under the rule, as we understand it, is evidence for a jury to consider, and from which silence guilt may be impliedly admitted. It is the duty of a court, in the exercise of a sound discretion, to charge a jury to receive this character of evidence with great caution. There does not seem to be any complaint against the charge in this regard. In the cases above cited, upon the respective sides, and reviewed, I am not able to say there is any material conflict. They can easily be distinguished by the rule I have attempted to show.'

There is one case, however, cited from Massachusetts, by the defendants' counsel (*Commonwealth v. Kenny*, 12 Metc. 235), which has features in conflict with the rule I have adopted, though there were peculiar circumstances in that case which seemed to control its decision. The court, however, not only concede, but lay down the general doctrine to be as we have stated it. We cannot do justice to that case, nor to the present, without a large extract from it. The defendant was indicted for stealing money and a bag, from the person of one Russel. Russel was not called as a witness, but evidence was offered to show that declarations were made by Russel, at the watch-house, in the presence and hearing of the defendant, in regard to the theft, to which the defendant made no reply. This evidence was objected to, but admitted by the court, and its admission excepted to. Other questions were in the case, but the judge in court, upon this point, reasons thus: He says the legality of the ruling depends upon this: "If a statement is made, in the hearing of another, in regard to facts affecting his rights, and he makes a reply, wholly or partially, admitting their truth, then the declarations and reply are both admissible." \* \* \* "In some cases, where a similar declaration is made in one's hearing, and he makes no reply, it may be a tacit admission of the facts. But this depends upon two facts: *First*. Whether he hears and understands the statement, and comprehends its bearing; and, *Secondly*. Whether the truth of the facts embraced in the statement is within his own knowledge, or

not; whether he is in such a situation that he is at liberty to make any reply; and, whether the statement is made under such circumstances, and by such persons, as naturally to call for a reply, if he did not intend to admit it. If made in the course of any *judicial hearing*, he could not interfere and deny the statement; it would be to charge the witness with perjury; and alike inconsistent with decorum and the rules of law. So if the matter is of something not within his knowledge. So if the statement by a stranger whom he is not called upon to notice; or, if he is restrained by fear — by doubts of his rights — by a belief that his security will be best promoted by his silence; then, no inference of assent can be drawn from that silence." So far, these general rules will obtain the assent of all. So will the following: "Perhaps it is within the province of the judge, who must consider these preliminary questions in the first instance, to decide ultimately upon them."

That is just what was done in the case at bar. Circumstances differ; of course, the ruling will differ to meet the circumstances. In the case from which we have been extracting, the learned judge thought the circumstances were such, that the declaration of the party robbed, to which the defendant made no reply, ought not to have been received as competent evidence against him. He might have been right in that case. It was not as strong as the case at bar. The following are the circumstances of that case: A witness testified, that being in one of the watch-houses in Boston, late in the evening, two watchmen of the city, having defendant in custody, came in, and one of the watchmen said, "Here is a man that has been robbing a man." Presently, Russel, the person named as having been robbed, came in crying, and said: "that man," pointing to defendant, "has stolen my money." The defendant was searched; no money found on him. While they were proceeding down stairs to lock defendant up, he was seen to hide something upon a shelf. Witness went to the place, and saw a bag, which he took up and said, "here's the bag;" the defendant was then on the stairs going down cellar, and within hearing. Russel immediately said, "that is my bag." One of the officers went to counting the money, the defendant standing by. Russel then said, "that was all the money I had in the world." The defendant made no reply to any of the aforesaid declarations. The learned judge remarked, I think justly, "the declaration made by the officers who first brought the defendant to the watch-house, he has certainly no occasion to reply to." It was made by one hav-

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ing no knowledge of the fact, and being an officer, it was an impertinent and an officious interference. Of course, this was improper. As to the other declarations made by Russel, the judge, I think, justly remarks: "The subsequent statement, if made in the hearing of the defendant, was made while he was under arrest, and in the custody of persons having official authority. They were made by an excited and complaining party to such officers as were just putting him into confinement. If not strictly an official complaint to the officers of the law, it was a proceeding very similar to it, and he might well suppose he had no right to say any thing until regularly called upon to answer."

If, in any respect, the case differs from the case at bar, I do not think it is in conflict with it. The judge is emphatic, and makes that one ground that the defendant was under arrest. That is not a ground of objection here in our courts. The declaration in that case was not made to the defendant himself. It was made to an officer, who had already, without knowledge of his guilt, proclaimed him a thief. A reply was not called for under such circumstances. If it is in conflict with the rule we have annunciated, it is also in conflict with the mass of authority we have cited, and with a case in Seneca county, reported in 1 Gray, 83, it stands alone. In the case at bar, the circumstances are strong enough to sustain the ruling, and to leave to the jury the consideration of the declarations of the complainant, the silence of the defendant as to a part, and their answer or reply to the other part, of the charge.

There are some other objections raised on the trial, though not much urged on the argument here, which I do not regard of sufficient merit to discuss at length. Among them, that this evidence of the declarations of Reynolds, and the reply of a *part* of the defendants, was neither the *res gestæ*, nor proper to establish a conspiracy. The pointing out, by Reynolds, of the defendants to the officers, I think, was a part of the *res gestæ*. What he said beyond this we have discussed. The conspiracy was sufficiently established, if Reynolds was to be believed, when he had described the actors, and the parts taken by each at the saloon. Upon the merits the conviction was right, and seems to have been demanded by public justice. The judgment and conviction should be affirmed.

MILLER, P. J., and PARKER, J., concurred.

*Judgment and conviction affirmed.*

## THE PEOPLE v. MITCHELL.

*Recorders of cities, jurisdiction — Husband and wife — neglect to support wife.*

Recorders of cities have jurisdiction, under 2 R. S. p. 704, § 1, to require disorderly persons to give security to keep the peace, and in default thereof, to commit them to the common jail.

It is no defense to a complaint against one for a breach of the peace in neglecting to support his wife, that he has brought an action of divorce against her, in which he has appealed from a judgment against him to the court of appeals, and that he has paid her a gross sum, awarded to her in that action, for alimony.

CERTIORARI to review proceedings, had before the recorder of Elmira. The facts sufficiently appear in the opinion.

*W. L. Dailey*, district attorney of Chemung county, for people.

*J. R. Ward*, for defendant.

P. POTTER, J. This is a *certiorari* to review proceedings before the recorder of the city of Elmira. The defendant was arrested upon a warrant issued by the recorder on the charge of being a disorderly person, in that he neglected to support his wife and child, and being brought before the recorder a trial was had in due form, as appears; the defendant was found guilty, convicted of the charge, and, in the warrant of conviction, required to find two sufficient sureties to enter into a recognizance, in the sum of two hundred dollars each, for his good behavior for the space of one year, and in default of finding such sureties, it was adjudged, and the said warrant of conviction directed that the said defendant be committed to the common jail of said county, to remain until such sureties be found, or he be discharged according to law. The *certiorari* is brought to review this proceeding before the recorder.

We are obliged to grope very much in the dark for reasons why this proceeding should be reversed upon the one side, or why it should be sustained on the other, the case being submitted without any brief or authority, cited upon the part of the people, and with a meagre brief with two general points, without reference to an authority, and with the absence of a legal proposition on the

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other. Indeed, nothing is presented that does not appear upon the face of the proceeding returned.

The two points raised by defendants are, 1st. "That the testimony did not justify the conviction." 2d. "The recorder had no jurisdiction in the case."

Reversing the order of these points in our examination, and looking, first, for jurisdiction, we find, that recorders of cities are among the enumerated officers, whose duty it is, to cause to be kept all laws for the preservation of the public peace, and, in the execution of that power, to require persons to give security to keep the peace. 2 R. S. 704, § 1.

Among offenses against the public peace, is that of persons "who shall abandon or neglect to support their wives or children." 1 R. S. 638, § 1.

The complaint expressly stated, "that Alfred Mitchell neglects and refuses to support his wife, Mary Mitchell, and his child."

The first above cited statute declares, that such persons are "disorderly persons."

The warrant issued by the recorder sets forth the complaint that Mitchell was a "disorderly person;" that he, the recorder, had examined, on oath, the complainant, and that it appeared to him that the offense had been committed, and it commanded the defendant to be brought before him, to be dealt with according to law, and he was brought accordingly. For aught that appears, the recorder had full jurisdiction.

Did the testimony support the conviction? It appeared by the testimony of the wife, that the parties had been married six or seven years. That they lived together about two years; that above four years before, he left her, with no means for her support; that he has neglected and refused to support her, and does so now. They had two children, one of which lives with her; that she worked out since he left her. She has no means for her support but her labor; the city authorities and the overseers of the poor have helped her some. That the defendant lives in that city, is a plasterer by trade, and has employment.

The defendant was himself sworn, and after stating that he was willing to take and support the child that was with his wife, and take its custody; that he had never refused to support the child; and that he was able to do so also stated, on cross-examination, that he quit living with his wife four years before; that he is a

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mason and general mechanic; that he has not given his wife any money within a year, and had not provided a home for her within that time, nor any food or clothing within that time, for her or for the youngest child. There was other evidence in the case which we will notice, but, under this point, it is seen that the testimony is abundantly sufficient to sustain the conviction. This, it must be remembered, was a proceeding under the statutes conferring criminal jurisdiction upon the officer to preserve the public peace.

Upon the same examination, as a defense or excuse for the charge so alleged against him, the defendant proved that there was depending in the courts an action for divorce brought by him against his wife, and that, while it was depending, there was an order made in the supreme court by which he was required to pay her for alimony, \$4 per week, during the pendency of the action; that a determination had been had in said action in the court, which determination had been reversed — that the case was now depending in the court of appeals — that, after its removal to the court of appeals, the application had been renewed for the original allowance of alimony, and an order made granting \$50 as a gross sum, and for expenses of the action, which sum he had paid to her attorney, but there was no evidence that he had paid any other sum, by virtue of any order of the court, than the said sum of \$50. The case is still depending; he is not divorced from his wife, nor released from the legal obligation of law to support her. The supreme court, by no order they can make, short of granting a divorce, can cast upon the public the burden of supporting the legal wife of a man able to support her, or to absolve the husband from that duty. The public, through their properly constituted authorities, can enforce that support from the husband, in the way pointed out, and as was done in this case. I am not able to see any error in the proceeding before the recorder, and think the conviction should be affirmed, with costs.

MILLER, P. J., and PARKER, J., concurred.

*Conviction affirmed.*

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Angell v. Cook.

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ANGELL v. COOK, impleaded, appellant, *et al.*

*Partnership—what is not—special agreement—Practice—modification of judgment.*

S., by contract in writing, agreed to work the farm of C. on shares, and to take a certain number of cows and keep them in a certain manner. It was also verbally agreed that a ton of feed should be purchased for the cows and that each should pay for one-half thereof. S. bought the feed of plaintiff, acquainting him with the agreement. *Held*, that such an agreement did not render S. and C. partners in the purchase of the feed, and that each was severally liable only for one-half the purchase price.

An action was brought in a justice's court against S. and C., jointly, for the price of the feed. Judgment was rendered in favor of plaintiff, which was affirmed by the county court, upon an appeal by C. *Held*, that the pleadings might be amended to meet the case (Code, § 64, subd. 11), the name of S. stricken out as an unnecessary party (Code, § 173) and the judgment affirmed against C., to the extent of one-half the amount rendered in the courts below.

CASE submitted upon printed briefs and points. The facts appear in the opinion.

*B. T. Wright*, for appellant.

*W. H. Warner*, for respondent.

MILLER, P. J. This is an appeal by the defendant Cook from a judgment of the county court of Cortland county, affirming a judgment rendered in favor of the plaintiff and against the defendant by a justice of the peace of said county, for thirty-four dollars and fifty-six cents damages, and four dollars and fifty-five cents costs. The complaint of the plaintiff alleged that during the month of March, 1871, the defendants were doing business as partners in carrying on the farming business in the town of Lapeer, New York. That as such partners they bought meat and feed to use in their said farming business, to the amount of forty dollars, of the plaintiff, and being so indebted to the plaintiff, they promised and agreed to pay the same, for which amount and interest, the plaintiff demanded judgment. The defendants denied each and every allegation in the complaint, and set up that the feed, etc., was bought by

the defendant Shepherd, without the knowledge or consent of the defendant Cook. It appeared, upon the trial, that the defendants entered into a written contract, whereby the defendant Shepherd agreed to work the farm of the defendant Cook on shares, taking a certain number of cows, and agreeing to keep them in a certain manner. It was also agreed between them, orally, that a ton of feed should be purchased for the cows, and each should pay for one-half thereof, and upon a statement of this agreement the plaintiff let defendant Shepherd have the feed, and charged the same to both of the defendants.

Upon the foregoing facts, which comprehend all that is material for the decision of this case, I am of the opinion that the justice erred in rendering a judgment in favor of the plaintiff for the amount claimed. The defendants were clearly not liable as partners, because no such relation existed between them which authorized either one of them to contract such a debt, and it cannot be claimed that the debt was contracted in that capacity. The most which can be insisted as to their liability to the plaintiff is, that they became indebted to him under and by virtue of a special contract, by which each one of them was to pay for one-half of the feed purchased by Shepherd of the plaintiff. This was an individual and a separate liability each for the one-half of the feed, according to the proof. Upon these terms the agreement was made and the property purchased, and the plaintiff and the defendants all assented and agreed to such an arrangement. Even if a joint liability may have existed, because the feed was for the benefit of the stock held by the defendants jointly, it cannot be maintained in this case, for the reason that the contract was special, and each of the defendants thereby was separately liable for the one-half of the feed purchased. It, therefore, follows that the judgment was erroneous, but as the defendant Cook was clearly liable for one-half of the feed purchased under the agreement, and the evidence is sufficient to uphold a decision for the amount actually delivered, I am inclined to think that upon this appeal the judgment may be modified so that one-half thereof, with costs, be affirmed as to the defendant Cook, and reversed as to the remainder within § 366 of the Code. The pleadings in this respect may be considered as amended to meet the case (Code, § 64, subd. 11), and the decisions of the justice upon the trial, which were objected to in this state of the case, were in no respect erroneous.



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Dusenbury v. Hulbert.

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The name of the defendant Shepherd, who was not a necessary party to sustain the action against the defendant Cook, may be considered as stricken out, so far as the judgment of this court is concerned within § 173 of the Code. See *Ackley v. Turbox*, 31 N. Y. 564. Judgment of the county court and of the justice is affirmed as to the appellant Cook, for sixteen dollars and twenty-eight cents, with interest, and the costs before the justice, and reversed as to the residue, without costs of appeal to the county court, or of the appeal to this court, to either party.

*Judgment accordingly.*

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DUSENBURY, collector of the estate of Lewis Seymour, deceased, v.  
HULBERT, appellant, *et al.*

*Mortgages — priority of lien.*

L. had a contract from B. for the purchase of certain premises for \$2,500, upon which he had paid \$100, April 1st. L. represented to plaintiff that he was the owner of such premises, and plaintiff then agreed to loan L. \$1,500 on a mortgage upon them. L. accordingly executed to plaintiff a bond for \$1,500; plaintiff paid him \$900, and it was agreed that plaintiff should send the remaining \$600 to L. on the following day, and that L. should execute the mortgage and deliver it for plaintiff to the county clerk for record. On the following day plaintiff sent L. the \$600. L. paid B. upon the contract \$900, April 2d, and \$500, April 8d. On the 6th April, L. paid B. \$100, received from B. a deed of the premises, and gave back a mortgage to B. for \$900, the balance of the purchase-money. On the 14th day of April, L. delivered to the clerk for record, his deed from B., and also the mortgage which he had agreed to execute to plaintiff. April 17, B. assigned his mortgage for \$900 to defendant, and on the following day, that mortgage was recorded. Neither plaintiff, defendant nor B. had notice of any of these transactions, except those in which they acted, as stated above, personally.  
*Held*, that the lien of plaintiff's mortgage was superior to defendant's.

APPEAL from a judgment entered upon the decision of the court, at special term.

The action was brought to foreclose a mortgage given to Seymour by one *La Grange*. Plaintiff was collector of Seymour's estate. Defendant *Hulbert* was the owner of a mortgage given by *La Grange* to one *Bowen*.

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Dusenbury v. Hulbert.

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The case was this: On the 1st of April, 1868, *Bowen* was the owner of the premises in question, and had contracted to sell them to *La Grange* for \$2,500, and had received from *La Grange* \$100 of that sum, the remainder was due that day; upon that day *La Grange* represented to Seymour that he was the owner of the premises, and Seymour agreed to loan him \$1,500, upon a mortgage thereon. *La Grange* gave plaintiff his bond for that sum; Seymour paid him \$900, and it was agreed that Seymour should send the remaining \$600 upon the following day, and that *La Grange* should execute the mortgage and deliver it, for Seymour, to the county clerk for record. April 2d, Seymour sent the \$900; *La Grange* executed the mortgage April 1st; but did not deliver it to the clerk until April 14th.

*La Grange* paid *Bowen* \$900 upon the contract, April 2d, and \$500, April 3d. On the 6th day of April he paid *Bowen* \$100, received his deed and gave back a mortgage to *Bowen* for \$900, the balance of the purchase-money. April 14th, *La Grange* delivered his deed, and his mortgage to *Seymour*, to the clerk for record. April 17th, *Bowen* assigned his mortgage to the defendant, *Hulbert*, and on the following day it was recorded.

Neither Seymour, *Bowen* nor *Hulbert* had actual knowledge of any of these transactions, except those in which they were personally concerned. *Bowen* was in possession of the premises until he received his mortgage.

The court at special term held that plaintiff's mortgage was the prior lien, and directed judgment of foreclosure accordingly. *Hulbert* appealed.

*M. M. Waters*, for appellant.

*Edward K. Clark*, for respondent.

P. POTTER, J. I place my decision of this case upon this ground, that both parties, being *bona fide* mortgagees, the mortgages taking effect at the same instant of time upon the estate, and the case not coming within the provisions of the recording act, inasmuch as Seymour was not a subsequent purchaser, the equities of the parties were equal; and neither being charged with actual or constructive notice of the other's lien, the preference is to be given to the first recorded mortgage, on account of the greater diligence by *Seymour*.

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Lord v. Wilkinson.

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But if the time of delivery of the mortgage to Seymour, instead of its date, is to be regarded as the time when it took effect as a purchase, then Seymour was a subsequent purchaser, and is entitled to priority under the recording act.

MILLER, P. J., and PARKER, J., concurred.

*Judgment affirmed.*

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LORD v. WILKINSON *et al.*

*Stolen bonds — liability of purchaser — good faith — finding of jury.*

In an action to recover the value of government bonds stolen from the plaintiff, and shown to have been subsequently purchased and sold by defendants, a firm of brokers, evidence was given on behalf of plaintiff that a hand-bill announcing the loss of the bonds and describing them, had been left with the firm, and the attention of the managing partner called thereto, and that he read the hand-bill. The evidence on behalf of the defendants was proved to be in part untrue, and it was contradictory. *Held*, that the submission to the jury of the question of good faith on the part of the defendants in dealing in the bonds, was proper, and the jury were justified in finding that defendants acted in bad faith, and were liable.

EXCEPTIONS ordered to be heard in the first instance at special term after trial, and verdict in favor of plaintiff. The facts appear in the opinion.

*W. H. Shankland*, for plaintiff.

*H. Riegel*, for defendant.

MILLER, P. J. This action was brought by the plaintiff to recover the value of two bonds of the United States of the denomination of one hundred dollars each, which had been stolen from a safe where they had been deposited for safe-keeping, together with others on the night of January 1, 1867. In the month of February following, one of these bonds were purchased and disposed of by the defendants who were bankers and brokers at Syracuse. The other bond was purchased and sold in August following. The case was tried before Mr. Justice MURRAY and a jury at the Cortland county circuit, in October, 1871. The defendants moved for a

nonsuit at the close of the evidence of the plaintiff, upon the ground that sufficient evidence of bad faith on the part of the defendants had not been given to the jury, which motion was denied and an exception taken by the defendants. At the close of the proofs the defendants again moved that the complaint be dismissed, and the jury be instructed to find a verdict in favor of the defendants upon the same, which was also denied and an exception duly taken. The jury found a verdict in favor of the plaintiff for the amount claimed, and the court ordered the exceptions to be heard in the first instance at general term.

The only question raised by the defendants is, that the plaintiff gave no evidence which would authorize a jury to find that the purchase of either of the bonds was made in bad faith.

In this position I think that the defendants' counsel is in error, and that there was sufficient evidence for the consideration of the jury, upon the question whether the defendants had acted in bad faith. There was evidence tending to show that the defendants had purchased these bonds which had the coupons cut off, and that prior to the purchase and on the 9th of February, hand-bills were issued in which a minute description was given of the lost bonds, one of which was shown to and left with one of the defendants, J. Forman Wilkinson, the active partner in the defendants' office, and his attention particularly called to the same and he warned against the purchase.

It further appeared that between the 9th and 12th day of February, the defendants examined the hand-bill carefully and found advertised what they claimed to have overlooked, a two hundred dollar Cortland county bond, which belonged to the McGraws, from whose safe it was stolen at the same time as the bonds of the plaintiff, and on the 12th, wrote to the McGraws to the above effect. And there is proof to show that one of the defendants admitted to the plaintiff that on the 14th of February, two days after he had written the letter to the McGraws, stating that he had carefully perused the hand-bill, that he had purchased one of the two hundred dollar bonds in controversy.

It was also proved that on the 14th of August following, then having knowledge and notice, the defendants sold another bond to their brokers in New York.

In addition to these facts, there was evidence upon the trial to contradict some of the statements by one of the defendants.

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The answer, among other things, states that the defendants kept no record of the securities which they bought and sold, and that they have no knowledge or information sufficient to form a belief that they sold to their brokers the securities described in the complaint, and therefore denies this allegation. The proof on the trial showed that they kept a record; that the bonds were recorded and sold to their brokers in New York. The defendants also denied the fact that he had sent one of the bonds to their brokers, although they had a record of it and afterward stipulated to admit it.

One of the defendants also testified that in February, 1867, they kept no record of bonds purchased, but, afterward, upon his cross-examination, admitted that they did keep such records.

There were also some other contradictions and alleged evasions, which it was claimed was not consistent with good faith and which might tend to establish bad faith.

Conceding that there were strong reasons to believe that the purchase of the bonds was made in the ordinary course of the defendants' business, for a full consideration and in entire good faith, yet, after all, it was a question as to the credibility to be given to the defendants' evidence, after a careful consideration of all the circumstances of the case. The testimony was, to say the least, conflicting, and it was for the jury to determine where the truth was. There was clearly sufficient evidence to submit the case to the jury, and, there being no error, the motion for a new trial must be denied, and judgment must be rendered on the verdict for the plaintiff, with costs.

*So ordered.*

McKINSTRY *et al.*, appellants, v. SANDERS *et al.*, executors, etc

*Will—construction of—legacies—when vested.*

2 T & C 181  
37 Mis<sup>1</sup>119  
37 Mis<sup>1</sup>120

A will provided that the executor should convert the real and personal estate into cash, and that if, after the payment of debts and legacies, "there shall remain an amount, not exceeding \$20,000, that *then* my said executor pay over the whole of said amount so remaining" to a religious society; "but in case the amount of said moneys so remaining shall exceed \$20,000, *then* my executor shall pay" to said society "only \$20,000, and that he pay over the residue thereof to my nephews and nieces who shall *then* be living, to be equally divided between them." After the payment of the \$20,000 there was a surplus. At the testator's death there were fourteen of his nephews and

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nieces living. One niece died about a year after the death of testator, and another about two years after, but before final distribution. *Held*, that the shares of the nephews and nieces vested at the time of testator's death, and the representatives of the deceased nieces were entitled to share in the distribution.

The law favors the vesting of estates, and unless the intention is unequivocally expressed to the contrary, it will not be imputed to the testator.

ROBERT MCKINSTRY, late of the county of Columbia, died October 27th, 1870, having duly made his last will and testament and codicil thereto. At the time of the testator's death there were fourteen nephews and nieces living, of whom Jane Sanders died on the 27th of October, 1871, and Jane P. McKinstry died on the 24th of December, 1872. The last-named left a last will and testament, by which she appointed Allen Rossman executor, and which was proved since the surrogate's decree. Augustus McKinstry, on or about the 22d day of December, 1870, took upon himself the execution of the will of Robert McKinstry, deceased. The said Augustus McKinstry, as executor, etc., filed his petition for a final accounting on the 19th day of October, 1872, and on that day citations for a final accounting were issued. At the time of the filing of the petition for the final accounting as aforesaid, Jane P. McKinstry was living, and was named in the said petition as one of the nieces interested in the estate of Robert McKinstry, deceased. The citation for final accounting was duly served on said Jane P. McKinstry, but she died before the decree was made and entered, and at the time the decree was made the will of said Jane P. McKinstry, deceased, had not been admitted to probate.

By his will, the testator, after having bequeathed \$6,000 as specific legacies, devised and bequeathed the balance of his entire estate to Augustus McKinstry, whom he appointed executor in trust for the purposes thereafter mentioned. The executor was directed to sell the real estate as soon after testator's decease as he should deem expedient, and upon such terms and conditions as he should deem most beneficial for the estate, and get in and convert the personal estate into money. From such moneys the executor was directed to pay debts, funeral expenses, and the specific legacies, and with the residue invest sufficient money to produce an income to pay certain annuities, and upon the death of the annuitants, respectively, to pay the principal of such fund to the Universalist church of Hudson; and upon such church giving a satis-

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factory bond to pay such annuities, then that the executor pay over to such church said fund, and also the balance of his entire estate. The will further provided, "that my said executor shall not be required to sell my real estate, or to settle up my estate in eighteen months after taking out (letters) testamentary, but that he shall be left to the free exercise of his own judgment as to the proper time to sell said real estate, and to close up and settle my estate."

By the codicil, the testator ordered and declared his will to be, "that if after the payment of all my just debts, funeral expenses, and the several legacies mentioned and bequeathed in and by my said last will and testament, the costs and expenses of settling my estate, there shall remain of the said moneys arising from the sale of my real estate, and realized from my personal estate, an amount not exceeding \$20,000, that then the executor pay over the whole of the amount so remaining to said church, on his receiving the bond for securing the payment of the annuities. But in case the amount of said moneys so remaining shall exceed the sum of \$20,000, then my said executor shall pay to the trustees of the said society and church, of the said moneys so remaining, only \$20,000, upon the execution of the bond," \* \* "and that he pay over the residue thereof to my nephews and nieces who shall then be living, to be equally divided between them."

On the application of the executor, a final accounting was had before the surrogate on the 27th of January, 1872, and the surrogate made a decree on that day, ordering the executor to pay to the executors of Jane Sanders, deceased, \$1,721.44, and to the personal representatives of Jane P. McKinstry, deceased, \$1,721.44, as residuary legatees under said will and codicil. Seven of the nephews and nieces appealed from the surrogate's decree to this court.

*S. L. Magoon*, for appellants.

*C. P. Collier*, for Allen Rossman, executor, etc., of Jane P. McKinstry, respondent.

*J. Sanders*, for Walter T. L. Sanders, executor, etc., of Jane Sanders, respondent.

**MILLER, P. J.** The testator by his will devised the residuary portion of his estate to the trustees of the First Universalist society of

the city of Hudson; and, by a codicil subsequently executed, provided that if there should remain of the moneys arising from the sale of the real estate, and received and realized from his personal estate "an amount not exceeding the sum of twenty thousand dollars, that my executors pay over the whole of said amount so remaining to the trustees of the said First Universalist society," etc.; \* \* \* "but, in case the amount of said moneys so remaining shall exceed the sum of twenty thousand dollars, then my said executors shall pay to the trustees," \* \* \* "and that he pay over the residue thereof to my nephews and nieces who shall then be living, to be equally divided between them."

The question to be determined is, the construction of the clause last cited, and the force and effect of the words "who shall then be living."

It will be noticed that the word "then" is simply employed twice in this provision of the will prior to the last sentence quoted, and evidently means *in that case*, and does not have reference to time. Its subsequent use in the same clause by no means renders it certain and conclusive that it was designed to refer to time alone, and it may well be argued that the testator intended to employ the word "then" in the same sense as he had previously done, so that it would read as before, *in that case*, thus leaving it to be fairly inferred that he designed to provide for the nephews and nieces living at the time of his decease. But, assuming that this construction cannot be upheld, I think that the interpretation of the words employed must be determined by the actual intention of the testator, to be gathered from a perusal of the entire instrument. Looking at the clause in question in that point of view, it is difficult to discover any reason for claiming that the testator intended to establish a technical, arbitrary rule, by which none but those of his nephews and nieces who were living at the time of the distribution of his estate were to be objects of his bounty. The design of the will and codicil evidently was to divide all which remained after the payment of the legacy to the church, equally among this class of relatives who might be living when he died, and not to cut any of them off, because of their decease prior to actual distribution.

The effect of a contrary rule would be to deprive each one of his or her portion who might, perchance, die at any time before the surrogate's decree. In the case of Jane P. McKinstry, who died after the citation for a final accounting had been served and before



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the decree, the application of such a rule would be extremely harsh and technical. Most certainly she was entitled to a vested interest *after* the amount of the estate was definitely known, and then, if not *before*, it became vested in her. How could any other rule be applicable in this case, after the amount was known and ready to be divided? The executor was then ready to pay over, and she was then living, ready to receive, and there is no good reason why she had not an absolute right because the surrogate had not made a decree. The executor would have been justified in paying her without a decree, and had he done so, would not, I think, have been liable to account to the other distributees for the portion so paid.

In the case of Mrs. Sanders, the property was all in existence when the testator died, and one year afterward, when she died. Perhaps, with reasonable expedition in the transaction of the business, the executor may have been able to realize from the real and personal estate, so as to have ascertained what the fund was, and have been ready to distribute, if the law would allow such distribution, before her decease. Can it be said, that because this was not done, that she lost her right to the legacy, and it never became vested? I think such a rule would be at war with the intention of the testator, and cannot be upheld upon any sound legal basis.

Independent of the reasons already adverted to, there is another strong ground for the position that the testator could not have intended to limit the bequests to his nephews and nieces living at the time of the distribution; and that is, that by the will the executor is not required to sell the real estate or to settle up the estate within eighteen months after taking out letters testamentary, but is left to the free exercise of his own judgment, as to the proper time to sell the real estate and to close up and settle the entire estate. Under this provision of the will, he had the power to take such time as in his judgment might be necessary to close up the estate, and thus by delay to prevent some of the legatees from receiving their legacies, in case of their death, before distribution. Strictly construed, he was also at liberty to wait until all died but himself, before making a settlement, and thus secure to himself, if he should survive, the whole estate which remained. Conceding that this time should be reasonable, and that the executor might be compelled to distribute, by an action at law, still, before the case could be brought to a final determination, some one or more may have died, and by the delay,

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have been deprived of the interest intended to be bequeathed. It cannot be supposed that the testator could have had any intention thus to vest the executor with a power so arbitrary, and leave to his will, caprice and opinion, which of the nephews and nieces, besides himself, should take the bequests under the testator's will.

The law favors the vesting of estates, and unless the intention is unequivocally expressed to the contrary, it will not be imputed to the testator. See *Manice v. Manice*, 43 N. Y. 368. In the case cited, it was held, that where shares or interests in real or personal estate, to be ascertained by a division or sale, are given by will, the estate or interest of each devisee or legatee is a vested interest, before the conversion or division. After laying down the rule as to the intention of the testator, in regard to the avails of real estate, it is said: "A similar rule is applied as to gifts of shares or legacies, to be paid out of a fund or surplus, to be collected in, or ascertained and divided, and in those cases, the interests of the legatees are held to vest absolutely before the fund is collected or the surplus ascertained, or division actually made." \* \* "And where the terms of the bequest import a gift, and also a direction to pay, at a subsequent time, the legacy vests, and will not lapse by the death of the legatee before the time of payment has expired, but will pass to his personal representatives." See, also, *Van Wyck v. Bloodgood*, 1 Bradf. 171, 172, and authorities cited; 1 Jarman on Wills, 619.

In conformity with this principle, it is held that a devise of real estate to one for life, and after his death, to three others, or "to the survivors or survivor of them, their or his heirs and assigns forever," that the remainder-man takes a vested interest at the death of the testator, and that the words of survivorship refer to the death of the testator, and not to the death of the tenant for life, unless from the other parts of the will it be manifest that the interest of the testator was otherwise. *Moore v. Lyons*, 25 Wend. 119. Although the case last cited relates to a provision in regard to survivors, and involves the construction of terms relating to survivors, yet the discussion covers the general question as to the interpretation of phraseology similar to that employed by the testator in the case now considered, and cases are cited and commented upon which are directly in point. See *Boraston's Case*, 3 R. 19, where it was held that the term "then" and "when," showed when the estate in remainder should come in possession, and not when it should vest in interest, and that this latter was at the time of the death of

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the testator. *Folten v. Williams*, Prec. in Ch. 78, and 2 Eq. Cases, Abr. 344, where it was decided, that the words "shall go to such of them as shall be living," must refer to a certain time, and that was when the legacies became payable, which was the death of the testator. *Stones v. Hsuntry*, 1 Ves. 165, where the words "after the death" were not considered as fixing the time when the interest should vest, but merely as constituting an interest in remainder. *Doe ex rel. Wheedon v. Lea*, 3 T. R. 41, when the devise was to trustees with remainder to a great-nephew, "when and so soon" as he should attain his age of twenty-four years, it was held, that the words only denoted the time when the beneficial interest was to accrue, and that an estate in fee vested which was descendible to the heir at law. See, also, *Goodtitle v. Whitby*, 1 Burr. 228, where Lord MANSFIELD cited *Matthew Manning's Case*, 8 Co. 95, and laid down the following rule, "where an absolute property is given; and a particular interest given in the mean time," until the devisee shall come of age, etc.; and when he shall come of age, etc., then to him, etc.," the rule is that that shall not operate as a condition precedent, but as a description of the time when the remainder-man is to take possession." Although the case last cited is not exactly similar to the one considered, yet the same rule applies, and the words "then living," are not to be considered as a condition precedent to the vesting of the legacy, but a mere limitation as to the time when the legatees are to receive and enjoy the same. In *Moore v. Lyons*, *supra*, the chancellor, at page 144, says: "A remainder is not to be considered as contingent in any case where it may be construed to be vested consistently with the intention of the testator." The adverbs of time, therefore, such as when, then, after, from and after, etc., are construed to relate merely to the time of the enjoyment of the estate, and not to the time of its vesting in interest." And the same rule is held to apply to bequests of personal property, pages 149 and 153. See, also, 43 N. Y. 370, 371.

In *Prowitt v. Rodman*, 37 N. Y. 42, the testator gave certain property to his daughter during her life, and after her death "to such children as should be living at the time of her death," it was held that the expression was not limited to the immediate offspring. And that the expression in the will, "children then living," may mean lawful issue or remoter descendants, if such was the intention of the testator, to be gathered from other parts of the will. See, also, *Doe dem. Barnes v. Provoost*, 4 Johns. 61. The effect of the cases

cited is, that words of this character are not to be taken in a literal and technical sense, but will be construed according to the testator's intention. There is also another rule applicable to legacies when the time of payment is postponed, which may be invoked in the case at bar, for the purpose of aiding in the construction of the provision in question, and that is, that where the payment is deferred, either on account of some interest in the subject being given to a person, upon whose death the gift is to take effect, or some difficulty attending the collection of the testator's effects, the bequest is considered as independent of the time named, and the legacy is vested at the death of the testator. *Dawson v. Killett*, 1 Bro. C. C. (Perkins' ed.) 124, note of Mr. Esten; *Hibler v. Whiteman*, 2 Har. 401; *Donner's appeal*, 2 Watts. F. S. 372; *Birdsall v. Hewlett*, 1 Paige, 32. The payment of the legacies here was postponed to enable the executor to dispose of the real estate, and convert the whole estate into money, thus making the bequests independent of the time named, and vesting the legacies at the time of the testator's death.

We have been referred by the appellant's counsel to several cases, to sustain the doctrine, that when the persons who are intended are those who shall be living at the time when a particular event shall have happened, which, in this case, is the final accounting of the executors; but I think they are not applicable, as will be seen on examination of these authorities. In *Can v. Robertson*, 5 N. Y. 125, a legacy was given to a church, provided that a certain clergyman, who was named, continued to be their pastor for seven years to come, but if not, then it should be paid to said clergyman, with interest. And it was held, that the condition annexed was a valid one, and that the pastoral relations between the church and the pastor, having been dissolved, by mutual consent, within the seven years, that no interest whatever vested in the church, but that the clergyman was entitled to the legacy. It will be observed, that here was a condition attached, which was not fulfilled, and upon which the right of the church to the legacy depended, while, in the case considered, there was no condition, and the authorities, as we have seen, hold that the terms employed do not operate as a condition precedent.

In *Burns v. Clark*, 37 Barb. 497, an express condition was imposed which was not complied with, and, therefore, the legatee took no vested interest, which is not this case. In the case of *Batsford v. Kebbell*, 3 Vesey, 363, it was decided that the legacy did not vest,

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because the testator gave only the dividends of stock, and not the capital, before the legatee arrived at the age designated, which was not a gift, but a direction for payment, which attached only upon a person of the age named.

In my opinion, none of the authorities relied upon affect the question now considered, and as the surrogate was right in his decree, the proceedings must be affirmed, with costs of the appeal to be paid out of the estate.

P. POTTER, J. The only question presented in this case is the construction to be given to the words "*who shall then be living*," at the conclusion of the second clause of the codicil. It is claimed by the appellants that the legacies therein given were contingent, and became vested only when the time arrived at which the executor had ascertained what amount of a fund there would be to be divided; and that the beneficiaries must also be ascertained by the number of them *then* living. In other words, it was claimed that there is a condition precedent to the estate vesting, viz.: that the beneficiary must be living at the time the executor ascertains the *extent* of the residue. This is the claim of the appellants, and it is claimed that the period of this ascertainment is the time when the decree of the surrogate fixed the *amount* of the residuary estate. At the date of this decree two of the fourteen nephews and nieces were dead, viz.: Jane Sanders and Jane P. McKinstry. Thus the appellants, claiming that the residuary estate should be divided into twelve equal shares, and only to the survivors, at the date of the decree (12) instead of fourteen who survived the testator, and to whom and to whose representatives the decree divided the estate. This presents the whole question on the part of the appellants.

Such is the construction of the human mind, and of consequence such the variation of language by testators in preparing their wills, that it has been pertinently said that "the language of will to be interpreted has no brother." This case justifies that remark. In the construction of wills, more than in any other instrument, says Lord COKE, the *intention* of the testator is the polar star to guide judges in their determination. Our courts have uniformly adopted this principle, and, therefore, in giving interpretation to wills, endeavor to carry out the intention of the testator, as far as it can be done without violating established rules of law. This intention (says Chancellor KENT) is the first great object of inquiry, and to

this object even technical rules are sometimes, and to a certain extent, made subservient. The ascertainment of this intent is subject to well-settled rules of construction, from which the courts do not readily depart. It is among these rules "that it is always to be presumed that the testator intended to make a legal disposition of his estate." *Dubois v. Ray*, 45 N. Y. 165. So, it is always the duty of the court to give to the language used such a construction as will make the will, or the limitations in it, legal and valid, if it can be done in harmony with well-settled rules, with the manifest intent, as settled by adjudicated cases, rather than such construction as will render it nugatory and illegal, even though the latter may be according to the literal or grammatical reading. In *Butler v. Butler*, 3 Barb. Ch. 310, Chancellor WALWORTH said: "In the construction of wills, if the language of the testator is such that it may be construed in two different senses, one of which would render the disposition made of his property illegal and void, and the other would render it valid, the court should give that construction to his language which will make the disposition of his property effectual." This rule was absolute in *Mason v. Jones*, 2 Barb. 230; *Grover v. Wakeman*, 11 Wend. 193. The English rule is the same. 1 P. Wms. 260; 4 De G. 312. And in the case of *Earl of Canrickard*, Lord HOBART said: "And here I do exceedingly commend the judges that are curious and almost subtile — *astuti* — (which is the word used in the Proverbs of Solomon, in a good sense when it is to a good end) to invent reasons and means to make acts according to the just intent of the parties, and to be wrought out of the act." Hobart, 277, b.

In *Inglis v. Sailors' Snug Harbor*, 3 Pet. 177, it was said: "That a *general* intent in a will is to be carried into effect at the expense of any *particular* intent, provided such general intent be consistent with rules of law," and "that construction is to be preferred, which, consistent with rules of law, gives effect to the greatest part of it." *Gallini v. Doe*, 3 Adol. & Ellis, 341. "Where the words of a gift are themselves plain, distinct, and capable of having a legal effect, effect must be given to them, notwithstanding any improbability which may arise from looking at other parts of the will. Parsons on Wills, 32. "Where the actual and primary intent of the testator, as collected from the whole will, is in harmony with the policy of the law, and of established principles of equity, the court will aid it by giving it such a construction." *Paterson v. Ellis*, 11 Wend. 293.

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"Where the *intention* of the testator is in doubt, the courts will incline to favor such intent as will hold to the *vesting* of the estate, and the clear *literal* interpretation of words in a will may be departed from, if they will bear another construction where other parts of the will manifest a different intention, and the court frequently rejects the strictly grammatical sense, to carry into effect such intent of the testator." *Rathbone v. Dyckman*, 3 Paige, 29. The courts will always *favor* such a construction as *vests* the estate, *never*. That construction would hold the estate in *abeyance*, and only from *necessity*, a construction that the estate is *contingent*. Where a general intent is apparent from the face of the will, *words*, expressing a particular intent, must give way to the intent which is general, and so this construction is to be made upon the *whole* instrument, and not upon a disjointed portion or single section of it, in order *that* all its parts are to be construed with reference to each other. These general rules may be called in to aid in giving interpretation to the single sentence of the will in question.

Two important questions are first presented in this case :

1. Interpreted in the light of the above general rules, who did the testator intend should have title to and enjoy this residuary estate?

2. When, and in whom, did the interest therein vest?

*First.* Does the *survivorship* in this case, expressed in the terms "*who shall then be living*," refer to the death of the testator, or to the dying of some one or more of his nephews and nieces after his death, and before the day of the payment of the legacies ? Or

*Second.* Does this survivorship depend upon a period certain and determined by law, or upon an uncertain period in the future, dependent upon some future occurrence, controlled by the action or volition of a third person, or other persons ?

*Third.* Does this survivorship depend upon a period to be determined by law, independent of either the death of the testator or the action of the executors ?

In determining these questions, it becomes necessary to inquire whether the interest of these legatees of the residuary estate was *vested* or *contingent*. The devise, in the first instance, to the executor in trust, is authorized by the Revised Statutes (1 R. S. 728, § 55, sub. 2), and could continue only for such time as was necessary to accomplish the purpose for which it was created. Laws of 1843, ch. 318, § 4 ; Laws of 1841, ch. 261 ; 3 R. S. (5th ed.) 16, 17, §§ 59, 60. The interest of the legacies is not, therefore, vested in him.

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It is a settled rule of construction, that an estate in remainder is *vested*, unless the contrary intention expressly appears upon the face of the will. It is seen, by the provisions of this will, that the devise of the residuary estate to the trustee was only in trust for the uses and purposes set forth in the will, and it vested in him a legal estate only for such purpose. It was, in effect, as declared by the Revised Statutes, a power in trust, for the benefit of the *cestuis que trust* — a mere naked trust, no further coupled with an interest than that he himself was one of the *cestuis que trust* — a tenant, in common with others. There was no power to accumulate or to receive rents and profits. *Downing v. Marshall*, 23 N. Y. 380. This question of the interest, being a *vested* one, was held as above stated. In *Perry v. Woods*, 3 Ves. 208; *Roebuck v. Dean*, 2 id. 265; *Doe ex dem. Long v. Prigg*, 8 B. & C. 236.

In this latter case, the court said: "The law inclines to such a construction as will tend to *vest* a remainder, unless a contrary intention appears, because *contingent* remainders are in the power of the particular tenant, and may be destroyed, and it is more likely the testator intended the limitation should be made secure, than that they should be defeated." So here, it ought not to be presumed that the testator intended that the trustee, by any caprice on his part, or by delay in his action, which his individual interest might dictate, or by his death, and the delay occasioned thereby, or by any delay on the part of the surrogate, intended or accidental, should defeat the interest of any one of the intended beneficiaries. This English rule was recognized and adopted in this State in the court of errors, in *Moore v. Lyons*, 25 Wend. 137. At page 144 of that case, the chancellor uses this strong language: "A remainder is *not* to be considered as *contingent in any case*, where it may be construed to be *vested*, consistently with the intention of the testator." In the case of *Manice v. Manice*, 43 N. Y. 368, RAPALLO, J., in delivering the opinion of the court, says: "It may be laid down as a general rule, that where, by a will, shares or interests in real or personal estates, *to be ascertained by a division*, are given, or where real estate is directed to be sold and the proceeds divided, the estate or interest of the devisee or legatee in the property so to be divided or converted is a *vested interest*, before the conversion or division." This proposition applies with all its force to the case at bar.

In the construction of a provision of a will there is no difference



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in the rule we have stated as to determining when the interest is *vested* and when *contingent*. It is the same rule in cases where the interest given follows a *remainder*, and when it is a mere limitation. A remainder depends upon the existence of a precedent estate, and vests at the creation of the estate. There is no other contingency in that case than as to the time of its enjoyment in possession, by the determination of the precedent estate, which day may be uncertain. In the case at bar, there is no *precedent estate*; and the interest given is not a *remainder*. Still, it is a vested interest. The estate is devised directly to the *cestuis que* trust, through a power in trust, to be executed for them. Such a devise is not a trust estate, but a power. No estate vests in the trustee, except as a tenant in common with the other beneficiaries. Nor does the estate come within the meaning of "an executory devise," which is defined to be "a devise of a *future estate* in lands, not to take effect at the testator's death, but limited to arise and *vest* upon some future contingency." Whatever may be its classification among estates, it comes exactly within the rule laid down in *Manice v. Manice*, *supra*. In the further discussion of the case under this point, we shall confine ourselves to the question generally of the time of devised estates vesting, and hold that the rule, as to *limitations* and *conditions*, is the same as it is in regard to *remainders*. It is claimed that there is, in this case, no devise or bequest in the will to the two deceased nieces. This argument, I think, is not sound. Story lays down the rule thus: "If a testator should, by his own will, desire his executor to give a particular person a certain sum of money, it would be construed to be a legacy." Eq. Juris., § 1068. Here was a direction to *pay* his nephews and nieces all his residuary estate in money. It was, therefore, a legacy; and it makes no difference whether the gift was to one or to a class, it was a legacy. These words, then, will not be construed to be a contingent limitation, to take effect on such future day as may be fixed for distribution; or such day as it shall please the trustee to settle the estate, or the surrogate to act. This is not the rule in any case, unless the language of the will unequivocally expresses the intention that the vesting of the estates of the beneficiaries shall be postponed to such future day. *Manice v. Manice*, *supra*. It is not so expressed in the will in the case before us.

It was added, in the last cited case, "If the *intention* (otherwise) is unequivocally expressed, effect must be given to it; but *such an intention* will not be imputed to the testator *if it can be avoided*."

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And it was further held in that case, "that a limitation over, to take effect in case of the death of the legatee before he has received his share, *does not take effect if the legatee lives to become entitled to it, though he die before it has been paid.*" Id., page 369. To the same effect are the cases *Everitt v. Everitt*, 29 N. Y. 40; *Traver v. Schell*, 20 id. 89; *Doe, ex dem. Barnes v. Provoost*, 4 Johns. 61. Parsons on Wills (74), says: If a legacy is bequeathed to one, to be paid or payable at some future time, it is nevertheless a *vested* legacy; and if the legatee die before the period of payment, it will go to his executor or administrator, and is then payable at the time he would have received it had he lived. It is an interest commencing (vesting) *in præsenti*, though *solvendum in futuro*." A recent case in the court of appeals (*Livingston v. Greene*, 52 N. Y. 118) was a devise to children, which could be conveyed to them only "after" and "upon the death of my wife." It was held that these words did not make a *contingency*, but simply indicated when the estate took effect *in possession*, that the children took a *vested* remainder, not subject to be defeated by their death prior to that of the widow; and it was also held in that case that the words in the will, "*should any of my children die,*" etc., could be construed to refer to a death after that of the testator, and before that of his widow, and it did not affect the interest of a child living at the death of the testator. No further cases need be cited to prove that each of the nephews and nieces of the testator living at his death, or, as we shall see hereafter, at the time the residuum was ascertained, had a *vested* interest in the residuary estate.

Under the provisions of this will and codicil, all the residuary estate of the testator, real and personal, was devised and bequeathed to Augustus McKinstry (his nephew), *in trust*, to be converted into money, and to be distributed in the following order to two classes of legatees: In the first class to the Universalist church and society of Hudson the amount of \$20,000, if so much there should be; and, in the second class, to the nephews and nieces of the testator, the remainder thereof. Of this class, at the testator's death, were fourteen persons, of which the trustee and executor was one. The interest of these several legatees, the church as well as the nephews and nieces, was, by the authorities I have cited, a *vested* interest, commencing at the death of the testator, with no difference except as to the order of payment. They all alike took an immediate *vested* interest in equity, the church to the amount of \$20,000, con-

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tingent only (not in vesting, but in enjoyment) upon such residue being equal to the said sum, and a vested interest in the said nephews and nieces, upon there being a surplus exceeding the said \$20,000. There being such a residuum in existence at the testator's death, there was no contingency as to there being an estate to take; the estate *vested* in interest immediately in all the nephews and nieces, and vested in enjoyment, on the distribution. The testator divided all his estate. The will took effect upon his death, upon all the estate devised. The rights of all the parties then became fixed, and it vested in all the beneficiaries. The will conferred no power upon the trustee to create a contingency, or to withhold from any *cestui que* trust his or her appropriate share, when the day of enjoyment should arrive, which day of enjoyment, only, was made to depend upon the closing up and settling of the estate, which, by the provisions of the will, the trustee was not compelled to do within eighteen months. But in that regard, this permission was no limitation upon his power to act at an earlier day, but he was left to the free exercise of his own discretion and judgment to act within that time. For aught that appears in the case he did act. It cannot be claimed that the giving of time to settle the estate, of itself, worked any change in the vested rights of the *legatees*, or created any contingency as to the vesting of their interests; nor did it alter the fact of there being a residuum, at the testator's death, to be divided; it only postponed the day of its enjoyment. The ascertainment of the *amount* of the residuum to be divided had no effect upon its vesting. Besides, these legacies were, in one sense, specific, and it is also a rule that a *specific* legacy vests immediately upon the testator's death, and it requires express language to the contrary to prevent it. Pars. on Wills, 71.

*Second.* Does the survivorship of nephews and nieces, expressed in this codicil by the words, "*who shall then be living*," refer to the death of the testator? If not, to what time does it refer? To whatever time it shall be held to refer, I regard it as settled law, that the time of its vesting must be a time *certain*. Even literally considered, the word "*then*" refers to a time certain. It cannot, in law, be a time indefinite or uncertain. It cannot be made so uncertain as to depend upon the will, conduct or caprice of a third person. From the language of this codicil, and by due legal construction, no other time is legally certain than the time of the death of the testator, or, if legally it may be a day certain in the future, it can

only be the time when first the power of division can be exercised by the trustee. I do not assert the soundness of the latter ; but we can examine the case upon each of these hypotheses, as if each were equally sound.

The case of *Trotter v. Williams*, 2 Eq. Ca. Abr. 344, cited from 25 Wend. 132, was a bequest to A of £500, to B £500 and to five others, £500 each. "And if any *die*, then her legacy, and also the residue of the testator's personal estate, go to such of them *as shall be living*." It was held "that the dying must refer to a *time certain*." That certain time was held to be the death of the testator, so that the dying of any one of the legatees subsequent thereto would not carry it to the survivors, but to the representatives of the one dying. In the case of *Lord Bindon v. The Earl of Suffolk*, reported in 1 Peere. Wms. 96, the Lord Chancellor said "that the surviving must apply to some particular time." The words of the devise in that case, after giving £20,000 to four sons and one daughter of his brother (his nephews and niece), were as follows: "*Equally to be divided* between them, share and share alike ; *and if either of them should die, then to the survivors or survivor of them*." One of the sons died after the testator, but before any part of the money was paid, and the question was upon his share. It was held, that the *dying* referred to the death of the testator. That case in all its features, and the language of the will, in legal effect, is like the case at bar. In that case, if *either should die*, the survivors take. In the case at bar, the survivors take who shall be then living. There is no difference in the effect of the language. In that case, as in the case at bar, the court held the devisees and legatees to be tenants in common, and not joint tenants. In both cases, the *dying* and *surviving* refer to a time certain ; and that time, it seems, is the death of the testator. It is laid down by Jarman (2 Jarm. on Wills, 162), as a general rule, "that all expressions in a will, importing a *division by equal shares* to the devisees, will operate to create a tenancy in common." In the bequest before us, to the nephews and nieces, are the words, "*to be equally divided between them*." In whomsoever, therefore, this interest vested, and whenever it vested, the beneficiaries were tenants in common. This I regard as an important point in the case. The case of *Stringer v. Phillips*, 1 Eq. Ca. Abr. 292, was a devise to five persons, to be equally divided between them, and the survivor and survivors of them, and if A (one of the five) "*shall die before his marriage, his share to go to another person*." It was held that the

dying and surviving related to the death of the testator, and this distinction (which is ever important) should be kept in mind, viz.: If surviving referred to the death of the testator, the five were tenants in common; if it referred to the survivors *after* the testator's death, they would be joint tenants. It was held they took as tenants in common. Courts of equity never favor a joint tenancy, when the language permits of a tenancy in common. Worth. on Wills, 286. *Heathe v. Heathe*, 2 Atk. 122; *Haws v. Haws*, 3 id. 524. Some of the above cited cases, and many others to the same effect, are reviewed and approved in *Moore v. Lyon*, *supra*. That was a thoroughly argued, and fully considered case, in the highest court of the State, and the rule was there broadly laid down, that a devise of a remainder is never to be taken as contingent as to the time of its *vesting*, unless it is so clearly and unequivocally expressed in the will itself, that, by necessary implication, no other construction can be placed upon its language. This emphatic rule was repealed in effect by RAPALLO, J., in *Manice v. Manice*, 43 N. Y. 368; and he cites in its support also, 6 Cruise's Dig. 444, § 11, and 3 T. R. 488.

This view of authority upon the two preceding points brings the bequest in the case at bar to be a vested interest in all of the fourteen nephews and nieces of the testator, and that they are all equally tenants in common in the residuum. Such a construction not only brings the case within well-established legal rules, but has a basis of equity and justice to support and uphold it. The opposite construction is without legal authority for its support; its basis is a *technical* literal reading of a single sentence, disjointed from the general scope and intent of the whole instrument; a construction that makes *contingent* the interests of some or all the beneficiaries under its provisions; puts the inheritance and estate in abeyance, which is never allowed, and places the whole residuum in the power of the trustee, to vest in *interest* at an uncertain day, subject, to some extent, to his will or caprice. No case can be found, I think, that will sustain such a construction. There is nothing in the language of the will or codicil, nothing in the surrounding circumstances of the case to warrant the conclusion that the testator did not regard with equal affection each of the fourteen nephews and nieces who came to be beneficiaries at his death. They were all equally near to him in blood, and it may be presumed, in fact, equally dependent upon his bounty, and if we take from the language of the will what is the legal presumption, it is expressed

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in *Barker v. Giles*, *supra*, "joint tenancy is an odious title in equity; it will never be held by construction, if a tenancy in common can be presumed; that '*survivors*' shall be understood to mean such as were living at testator's death," and as was also said, "there being being no reason that because a man lived longest and had a better constitution, therefore he should be entitled to the whole estate." Chancellor WALWORTH, in *Moore v. Lyon*, *supra*, said: "The weight of authority both here and in England unquestionably is in favor of applying the *terms* of survivorship upon the devise of a remainder, to the death of the testator." The words, "*who shall be then living*," are clearly words of survivorship. There is no difference, in effect or in meaning, between the two expressions, — "*shall pay to the survivors*," and "*shall pay to such as shall then be living*."

*Third.* But it is claimed by the appellants, and upon this claim the whole argument depends, that though the interest in this residuum may have vested at the testator's death, it was a *contingent vesting*, dependent upon their surviving the day of settling the estate; that in this view, the word "*then*" is absolutely controlling as to the number of beneficiaries who shall be entitled, and means only such as shall then be living. I cannot adopt that construction. It has already been shown that such a construction would make it an illegal devise. This would be so, even if such was actually the testator's intent. In the case of *Atkinson v. Hutchinson*, 3 P. Wms. 259, the Lord Chancellor said: "I admit the devise of a trust must have the same construction as that of a legal estate, and that accidents subsequent to the making the will shall not in anywise affect such construction. And further, that though the intention of the testator is greatly to be regarded, yet this intention *must ever be consistent with the rules of law*." The words in question are capable of another and of a legal construction. And as was held in the last cited case, "where words of a will are capable of a two-fold construction, it is just and reasonable that they should receive such construction as tends to make it good." This adverb, "*then*," is, by well-settled rules of law, capable of being made to refer to another time than that of the day of settlement of the estate. We may look at extrinsic circumstances to point at the intent of a testator in the use of words capable of more than one meaning. The will, of course, was prepared in the testator's lifetime. This word "*then*," at the time of writing, in his mind, referred

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to some future day. The law requires it to be a day certain. This certain day was either the day of his death, or some other day certain in law, because "*then*" is here an adverb of time. To give legal effect to this will, the court are placed in the alternative of construing the word "*then*" to refer to the death of the testator, or to some other day certain, in order that the estate may vest, rather than it should remain contingent. Authority must settle this. *Boraston's case*, 3 R. 19, is in point. That was a devise of lands for eight years, and afterward to executors for the performance of the will, till the testator's son should attain the full age of twenty-one years, and *when* he should come of age, *then* he should enjoy the same to him and his heirs. The son died under age. *Held*, 1st. That this was a good devise of the *term* until he should attain the age of twenty-one, and that the interest of the executors continued until such time as he would have been of age, had he lived. 2d. That the remainder was executed (vested) in the son, and was not in contingency. That the adverbs, "*when*" and "*then*," only denoted the time when the remainder was to take effect in possession, and not when the remainder should *vest*. The adverb "*then*," in the case at bar, does denote the time of taking possession; but it is claimed that it has another and a double meaning, to wit, the time of vesting in interest, and also of its vesting in possession. Such a construction would have the interest either *contingent* or in *abeyance* during the period between the testator's death and the day of payment. This, as we have seen, cannot be. *Boraston's case* settles three points in the case at bar: 1st. That this residuum was *vested* at the testator's death; 2d, that the adverb *then* related to the time of enjoyment, in distinction from its vesting in interest; and, 3d, that the time of vesting of an estate is a time certain. That case was recognized and adopted as sound in the court of errors in this State, in *Moore v. Lyon, supra*, in which the chancellor said, "the adverbs of time, such as *when, then, after, from, and after, etc.*, are construed to relate merely to the time of the enjoyment of the estate, and not to the time of its vesting the interest."

But it is claimed that this adverb *then*, if it cannot legally refer to the day of the payment, may refer to the day when it is ascertained that there is a residuum for the nephews and nieces of the testator, and that such is the literal and grammatical reading of the sentence, "*who shall then be living.*"

This would be a far more sensible construction than to refer the day of vesting the interest to the day of its payment, or to the day of the surrogate's decree, for the reason that the day of ascertainment of the existence must be a day certain — physically certain; and a day which the law would determine and establish; whereas, the other construction would be a day uncertain — a day dependent upon the volition of an individual, interested in postponing the day of its vesting; or it may be dependent upon the volition, or convenience, or death of the surrogate, which might delay and make uncertain the day of its vesting.

But I do not think this adverb "*then*," in this last branch of the sentence, is to be construed, or that its meaning is according to this last proposition of the counsel of the appellants. Its meaning is controlled and qualified by the whole paragraph, or latter portion of the paragraph with which it is connected, the whole of which must be read in connection, in order to ascertain its bearing. So reading it, the manifest intent and legal effect will appear. In its legal reading, some words (understood but not expressed) may be supplied. The context reads thus: "*But in case the amount of moneys so remaining shall exceed the sum of \$20,000, then*" (that is at that time — or, in that case — or, when that result happens) "*my executors shall pay to the trustees of the said Universalist Society and church, of the said moneys so remaining, only \$20,000 and that he*" ("*then*" legally understood) "*pay over the residue thereof to my nephews and nieces who shall 'then'*" (that is, at the time the moneys so remaining shall exceed \$20,000) "*be living, to be equally divided between them.*" Thus reading it, literally, and according to its legal interpretation, the adverb "*then*," last occurring, refers not to the time of payment — not to the decree which only fixes the *amount* to be paid, but to the *time* when the residuum shall be ascertained to exceed \$20,000. This excess of \$20,000, *then*, at least, if not at the death of the testator, *vested* in such of the nephews and nieces as were *then* living. This is not only the literal and legal, but it is, as I think, the correct grammatical reading of the sentence. It is the only reading that can give legal effect to the gift. By every rule of construction known to the law, or in equity, the courts are bound, not only, if possible, to give legal effect to the will, but to give it an interpretation that will *vest* the estate — to make the time of its vesting a certain, and not uncertain time; to lean against a construction that would make the gift contingent;



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or hold the estate in abeyance, and to hold that the legatees take the estate as tenants in common, and not as joint tenants. This last construction, upon this fair reading of the language of the will, taken altogether, and not by disjointed sentences, brings the provision within all the established rules of interpretation which we have presented. If the estate becomes legally vested by adopting either of these alternatives as to the time, it requires clear, express and unequivocal terms to divest it. No such terms are found in the will. Jarman, in his treatise (2 Jarm. on Wills, 97), lays down this rule in regard to bequests to *children*: "Where mention is made of the *objects* of the devise, at the period of distribution, this is not intended to designate *children* existing at *that* period; for it has already been shown that all who have existed at the interval between the death of the testator and the period of distribution, whether living or dead at the latter period, are the objects of the gift; and may, therefore, not improperly be termed objects *at that period*, their decease before the period of distribution having no other effect than to substitute their respective representatives." If this is the rule as to children, it is the rule as to nephews and nieces.

It was certainly a reasonable provision of this will that the trustee should have time given to settle the estate before he should be required to pay it over to the legatees, and thus to postpone, if necessary, the day they should be permitted to enjoy it; but I can find nothing in this provision of any evidence of a legal intent to cut off any of these beneficiaries, by reason of their want of strength to live to the day of this distribution, or to cut off their legal representatives from taking, on account of a providential dying of the legatee, before the payment of the legacy. At the death of the testator, as we have attempted to show, his whole estate vested, if such construction is possible, vested in somebody; or, it must be a *contingent limitation*, if no other construction can be given. We have shown that it was not vested in the trustee, except for the purposes of the trust, and that it is only a power in trust. The will, in law, speaks from the testator's death. Then he had fourteen nephews and nieces living. This residuum, if it then existed, it then vested in these fourteen as tenants in common. Or, if it did not *then* vest, it did so vest at the instant it was ascertained there was a residuum to be divided. The date of this instant of time is not furnished by the case. It is not shown that this period of time was subsequent to the

death of either of the two deceased nieces. Assuming, then, in the remaining discussion of the case, that the *vesting* is at this last-mentioned period, then the argument that, at the death of the testator, the interest of these nephews and nieces were severally contingent upon their living to the day of its vesting is completely answered. But I have looked in vain for a *contingent* estate, that was dependent upon its vesting upon such an uncertain day, as a day to be determined by the chance or accident of the exercise of the will, volition, pleasure or caprice of a third person interested in its postponement, and by whose protracted postponement he himself might become the survivor of all the aged or infirm co-legatees, and thus possess himself, by survivorship, of the whole estate by a wrongful omission to act. Equity would refuse to give such an interpretation to a devise. Such a contingent estate, I think, is not known to the law. I can find no authority to sustain it. It seems to me to be little short of a legal absurdity so to hold. If the estate is vested at either period, viz., the death of the testator, or even at the moment when it was ascertained that there was a residuum to be divided, no subsequent omission to act by the executor and trustee, or by the surrogate, or by the death of either, or by any other delay, can defeat a vested estate. And such a condition of the estate, or such a happening, does not make the estate contingent.

The death of the testator, or the day of ascertaining the existence of this residuum, settled the fact of its existence and of its vesting. The day directed in the codicil to pay it over is only the day when the *amount* is ascertained and settled. This latter day had nothing in it that settled the legal day of its vesting. It was the legal duty of the trustee to pay it when the estate had been converted into money. If either the trustee or surrogate had refused to act after the estate was converted into money, when duty demanded their action, equity would have interposed and have performed the act itself at the proper time; and, if needful to that end, will appoint a trustee to perform it, and will regard as done and completed at that instant of time, the act or thing that equity and good conscience requires should then have been done. Lewin on Trusts, §§ 526, 693 to 697; *Kane v. Goit*, 24 Wend. 660; 5 Barb. 196; *De Peyster v. Clendinin*, 8 Paige, 310; Story on Eq. Jur., § 1061. This point of the appellants, therefore, of a contingent vesting in each legatee of this class, subject to their surviving *to the day of settling the estate*, is not sound. Such a contingent vesting will not be imputed

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as an intent of the testator, or implied from the language of the will, and, even if clearly expressed, I think it would be an illegal trust, creating a suspension of ownership, and unauthorized by the Revised Statutes.

But if we are in error as to all the views above expressed, I am unable to see how, upon the case presented to us, we can reverse the decree of the surrogate. The appellants show no error in the decree. Though the will allowed time to the trustee to settle this estate, and to exercise his own judgment and discretion as to the time to sell the real estate and close up the whole estate, it did not restrain him from acting immediately, and he was also authorized to act at once. The will expressly authorized him to sell as soon as he should deem expedient. The condition of the estate at the testator's death is not shown. For aught that appears, there was little real estate to be sold, it may all have been converted into money before the testator's death, except \$16,331.03, mentioned in the executor's schedule as the amount of sales of real estate under the will; and there is no evidence of the time of *this* sale. The residuum to the nephews and neices was payable at the same time as the legacy to the Universalist church. It nowhere appears when he paid that legacy, nor that he did not pay the legacy to this church within three months of the testator's death. It nowhere appears that the trustee did not have the whole residue in hand to be paid to these fourteen beneficiaries, before the death of any one of them; if so, it was their due, and he was in the wrong in withholding it. A court of equity would have enforced the payment in such case; they would regard as done what ought to have been done, and any delay or wrong in withholding it could not inure to his or the other survivors' benefit. In fact, there is nothing in the case to show that the surrogate had not the full evidence before him, in this regard, to justify and uphold the decree. Indeed, the surrogate certifies, that on the hearing, all the parties having appeared, and objections having been made, "*and the said parties having submitted certain proofs in this matter*", and after hearing the arguments of the respective counsel herein, upon the construction of the last will and testament, and codicil annexed, \* \* I thereupon entered the decree," etc. There was, then, evidence not presented to us. Upon the appellant was the burden of showing error. In the absence of error being shown, it is the duty of this court to uphold the decree. Surely it cannot be denied that it was the duty

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of the trustee to pay over this residue when it came to his hands. We must assume that the surrogate had before him the proper evidence in that regard, and that, upon that evidence, he did what equity and good conscience required him to do. We may also presume that money came to his hands before the death of either of the nieces. For aught we can know from the case the surrogate acted right, and had sufficient evidence to support the decree. Equity has been done.

Upon the whole case, I think the decree of the surrogate should be affirmed.

PARKER, J., dissenting. This is an appeal from the decree of the surrogate of the county of Columbia, made upon a final accounting before him, of Augustus McKinstry, executor, etc., of Robert McKinstry, deceased.

Robert McKinstry, late of the city of Hudson, of said county, died on the 27th day of October, 1870, having previously made his last will and testament, and a codicil thereto, which were duly admitted to probate, as a will of real and personal estate, on the 22d day of December, 1870.

By the will, which bears date the 19th day of November, 1864, after giving various legacies, he devises and bequeaths all his estate, real and personal, to his nephew, Augustus McKinstry, in *trust*, to convert the same into money, and, after payment of his debts and funeral expenses, to pay in full the several legacies thereinbefore bequeathed, and from the residue of said moneys to invest, in his own name, a sum sufficient to produce annually the net sum of \$275, which he is to pay out in certain prescribed annuities, and what shall remain of said moneys, after such investment, to pay over to the trustees of the First Universalist society and church in the city of Hudson, for the use and benefit of said society and church; and upon the death of the annuitants, severally, such share of the sum invested as produces the annuity of each is to be paid over to said society and church for the use and benefit thereof. He then appoints the said Augustus McKinstry the sole executor of said will.

On the 13th day of December, 1869, the testator executed a codicil to said will, in and by which he declared and directed, that if, after payment of his debts and funeral expenses, and the several legacies mentioned and bequeathed in his will, and the costs and expenses

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of settling his estate, there should remain, of the moneys arising from the sale of his real estate, and realized from his personal estate, an amount not exceeding \$20,000, then his said executor "pay over the whole of said amount so remaining to the trustees of the First Universalist society and church in the city of Hudson, for the use and benefit of said society and church, upon the said society and church, or any one in its behalf, executing a bond or other proper instrument, securing the payment to my brother, Henry McKinstry, during his natural life, the sum of one hundred dollars annually, and to my niece, Mary Ann McKinstry, during her natural life, the sum of seventy-five dollars annually; such bond to be approved of by my said executor as to its sufficiency, for such purpose. But in case the amount of said moneys so remaining shall exceed the sum of twenty thousand dollars, then my executor shall pay to the trustees of said society and church of the moneys so remaining only twenty thousand dollars for the use and benefit of the said society and church, upon the execution of a bond or instrument as above-mentioned for the payment of the above-mentioned annuities to my brother Henry, and my niece Mary Ann McKinstry, and that he pay over the residue thereof to my nephews and nieces *who shall then be living*, to be equally divided between them."

At the time of his death the testator had nephews and nieces living who survived him, to the number of fourteen, two of whom had died before the making of said decree, to wit: Jane Sanders, on the 27th day of October, 1871, and Jane P. McKinstry, on the 24th day of December, 1872.

Upon the 19th day of October, 1872, the executor made his application, by petition to the surrogate, for a fixed accounting, which was perfected, and the decree thereupon entered on the 27th day of January, 1873.

Upon such final accounting, it was found and determined that, after payment of debts and legacies and expense of settling the estate, and of the \$20,000 to the said society and church, there remained a surplus or residue in the hands of the executor of \$24,100.16, to be paid over to nephews and nieces of the testator, in pursuance of the residuary bequest in the codicil, and the surrogate divided such surplus or residue into fourteen equal parts, of \$1,721.44 each, and after decreeing to each of said nephews and nieces then living one of said shares, directed and decreed that one of said equal shares be paid by the executor to the personal representatives

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of each of said nieces who had died before the making of said decree.

From this part of the decree, giving portions of such residue to the representatives of the deceased nieces, this appeal is taken, by six surviving nephews and nieces, one of said six having obtained the transfer of, and now owning in addition to her own, the share of a surviving nephew.

The question raised is upon the construction of the last clause of the codicil above referred to, to wit: "*And that he pay over the residue thereof to my nephews and nieces who shall then be living, to be equally divided between them.*"

What is the force and effect of the expression "who shall then be living," in that clause? The surrogate so interpreted this expression as to entitle each of the fourteen nephews and nieces, living at the testator's death, to an equal share of such residue, while the appellants claim that the bequest is limited to those living at the time of the making of the decree upon the final accounting.

If any effect is to be given to the words "*who shall then be living,*" I can see no other than that claimed by the appellants. I am quite unable so to construe the sentence as to make the words refer to the time of testator's death.

If such construction could be fairly placed upon them, I confess that would be the one which I should think ought to be adopted. But that I think is quite impossible.

This residuary provision is in respect to a portion of a trust fund, uncertain in respect to its existence and amount. The testator, in considering what the trustee shall do with it, in the event that a surplus be found to exist, directs that he pay it over "to my nephews and nieces *who shall then be living.*" If it had been merely "to my nephews and nieces," then, doubtless, all his nephews and nieces, living at the time of his death, would have been intended, but he adds, "*who shall then be living,*" most clearly distinguishing between *all* his nephews and nieces, surviving him, and those who shall be living, when the time comes, in which the trustee is to pay over such residue. The question is one of identification of the legatees, rather than one of time, when the legacies shall vest.

The persons to receive the surplus are indicated by the description, "my nephews and nieces who shall then be living," *then*, when the executor and trustee shall, after having converted the estate, real and personal, into money, have paid debts, legacies, *and expenses*

of settling the estate, and established, upon an accounting and settlement before the surrogate, what amount of surplus, or residue, beyond the legacy to the Universalist society and church, if any, will remain for distribution. The point of time when this shall have been accomplished is the time indicated by the word *then* in the phrase "who shall then be living." The above are not only the immediate and natural antecedents of the word *then* in the phrase, but the only ones, or their culmination the only one, to which in the natural and grammatical construction, or by any interpretation of the language, it can refer.

Nothing can be clearer, I think, than that such is the plain import of the language under consideration ; and unless this language can be disregarded, the construction adopted by the surrogate cannot be sustained. I know of no canon of interpretation in the construction of wills that requires or allows the setting aside of plain and unequivocal language.

The intention of the testator, which is the end always sought in the construction of wills, is to be ascertained, if possible, from the language of the will, and when that is expressed in plain and unambiguous language, interpretation is not required. The maxim of Vattel, in regard to treaties and other instruments, is applicable: "The first general maxim of interpretation is, that it is not permitted to interpret what has no need of interpretation. When an act is conceived in clear and precise terms, where the sense is manifest, and leads to nothing absurd, there can be no reason to refuse the sense which this treaty naturally presents. To go elsewhere in search of conjectures, in order to restrain or extinguish it, is to endeavor to elude it." Potter's Dwarria, 126. It is one of Mr. Jarman's rules of construction, that "words in general are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and that other ascertained." Also, that "the inconvenience or absurdity of a devise is no ground for varying the construction, when the terms are unambiguous." 2 Jarman on Wills, 743.

Much stress is laid by respondent's counsel upon the circumstance that, if the appellants' construction is to prevail, the consequence will be that the executor and trustee, himself one of the nephews of the testator, and comparatively a young man, has it in his power to delay the time when the shares will eventually vest, to his own advantage, from the dying off of distributees in the mean

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time, inasmuch as he is left, by the express terms of the will, "to the free exercise of his own judgment as to the proper time to sell the real estate, and settle up the estate."

This effect of the construction of the residuary bequest, in accordance with its plain terms and manifest sense, is no ground for varying the construction, by striking out the words "*who shall then be living*," or by an injurious torturing of the language into an unnatural and artificial meaning, which would be the effect of the construction of the learned counsel for one of the respondents. The word "*then*," it is urged, is not here an adverb of time, but refers merely to the fact or circumstance that there is a residuum; as if the will and codicil [it is said] had read as follows:

"Whereas, it is uncertain whether the estate I shall leave at my death will exceed \$20,000, after payment of my debts and specific legacies, and expenses of administration; now, therefore, *in case it does*, my will is, that such residue shall go to my nephews and nieces who shall survive me." This is a paraphrase which the language will by no means bear. The word "*then*" is, undoubtedly, in some connections, a conjunction, meaning, "*in that case*." It is so used in a previous part of the same sentence, "but in case the amount of said moneys so remaining shall exceed the sum of \$20,000, *then*, my said executor shall pay," etc., meaning, "*in that case*, my said executor shall pay." But it is plain that in the portion of the sentence here in question, to wit, "that he pay over the residue thereof to my nephews and nieces who shall *then* be living," the word "*then*" can have no such meaning, but is clearly an adverb of time. If it had been "in case the amount so remaining shall exceed \$20,000, *then* my executor shall pay such excess to my nephews and nieces, equally to be divided between them," the meaning given by the learned counsel to the word "*then*" would be appropriate, and the paraphrase correct. The force of the word "*then*," in the clause in question, as an adverb of time, cannot, however, be avoided. The entire phrase, "*shall then be living*," necessarily relates to time, and to a time indicated by the preceding part of the sentence. The cases cited to show the inclination of the courts to construe the language of wills giving estates to classes of persons, and to the *survivors* of them, as meaning survivors of the testator, do not reach this case.

I have already said, that if the language here in question could be fairly construed to refer to the time of testator's death I should



be disposed so to construe it. In those cases the term "*survivors*" might well be construed to mean survivors of the testator, and, consequently, such construction was given to the term. Such was the case of *Moore v. Lyons*, 25 Wend. 119, on which, and the cases therein cited to sustain it, the counsel mainly relies. Then the language was "and from and after her death [that of Mary, the devisee for life] I give and devise the said dwelling-house and lot of land to Susan, Jane and Betsey, three daughters of the said Mary, or to the *survivors or survivor of them*, their or her heirs and assigns forever," and it was held that the words of survivorship referred to the death of the testator, and not to the death of the tenant for life, pursuant to the technical rule that such construction should be adopted, unless from other parts of the will it be manifest that the intent of the testator was otherwise. But this rule is founded upon the technical meaning which has been fixed upon the words "*survivor or survivors*," in a context similar to that of the will then being considered.

Then the gift was to the three, or to the *survivor* of them. The remainder so given, therefore, vested in such of the three as survived the testator; a construction of the language "*survivor*," pursuant to the technical rule. But here the word "*survivor*" does not occur, and there are no words of gift that can be construed as applying to the fourteen nephews and nieces. The first and only disposition of the residue is, not "to my nephews and nieces, or the *survivor or survivors* of them," but "to my nephews and nieces *who shall then be living*,"—the testator then pointing out and specifying the persons *to whom* this residue *is bequeathed*, and not thereby merely limiting the time when a bequest already given shall take effect in possession.

No doctrine can be derived from the leading case of *Moore v. Lyons*, or from the English and American cases on the subject, so exhaustingly therein cited, which will refer words indicating time, in the giving of property by will, to the death of the testator, as the time of the vesting of the gift, unless the items of the will are such as will, under the rules of interpretation, bear such reference. The question is one of construction merely of the terms of the bequest, and unless, by a fair construction of them in connection with the whole language of the will, such reference can be borne out, it cannot be adopted, as we have already seen in the case at bar; the language will not bear or admit of any such construction.

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In behalf of the representatives of Jane P. McKinstry, one of the nieces who died before the settlement of the estate, it is claimed and argued that, even granting the construction herein above given to be correct, still the time referred to must be limited by the time within which the law requires the estate to be ready for settlement, to wit, at the end of eighteen months from the time of the granting of letters.

In this case the executor was, by the testator, invested with a trust, including the conversion of his real estate into money, which he was, in terms, given no longer time than eighteen months to execute. The residue in question was to be raised, in part, from such sales of real estate, and the executor was not bound to be ready to account and settle up the estate at the expiration of eighteen months, but was left to the exercise of a sound discretion as to the time when that should be done. It is not urged that the excess of time over eighteen months which he took was at all unreasonable.

There being no time fixed by law for the division of the residue, except that when the decree was made, and the time of actual division being within a reasonable time, I think the time when the accounting and settlement was completed, and the decree for division made, must be taken as the time when the right to the shares accrued.

The result is, that the decree of the surrogate should be reversed in so far as it devotes any portion of the residue belonging to the shares represented by the appellants to the representatives of Jane Sanders and Jane P. McKinstry respectively, and that said decree should be so modified as that seven-twelfths of each of said two sums of \$1,721.44 given to them, respectively, in said decree, be directed to be paid to the appellants, respectively, in addition to the sums already given them by said decree, as follows, to wit, the sum of \$286.90 to each of said six appellants, and the additional sum of \$286.90 to said appellant, Mary Ann McKinstry, and that the respondents herein pay the appellants the costs of this appeal.

*Decree affirmed.*

STOWELL *et al.*, appellants, v. GRAVES, executors, etc., *et al.*

*Will — construction of — remainder, when it vests.*

A will contained the following: "It is my will, and I hereby direct that so much of my estate shall be safely invested on interest as will produce an annual income of \$600, and that the same be kept so invested by my executors and the interest paid to my said wife, annually or semi-annually, for and during her natural life, in the manner directed in and by the second item of this, my said will, and after the decease of my said wife, Mary Ann, the said principal sum to be equally distributed among my heirs at law." One of the testator's sons, living at testator's death, died before the death of his mother, leaving a widow, his administratrix, but no children. *Held*, that the principal vested in the testator's children at his death, and that, upon the death of the mother, the son's widow was entitled to his share as his representative.

APPEAL from a decree of the surrogate of Otsego county. The necessary facts appear in the opinion.

*Samuel A. Bowen*, for appellants.

*E. M. Harris*, for Graves *et al.*, executors.

*H. Sturges*, for Mrs. Stewart, administratrix.

P. POTTER, J. This is an appeal from a decree of the surrogate of Otsego county. The only real question in the case arises upon the construction of the seventh and eighth clauses in the will of Chandler Root of Cooperstown, in said county, which is in the following words:

"*Seventh.* It is my will, and I hereby direct that so much and such part of my estate shall be safely invested on interest as will produce an annual income of \$600; and that the same be kept so invested by my executors, and the interest paid to my said wife, annually or semi-annually, for and during her natural life, in the manner directed in and by the second item of this my said will, and after the decease of my said wife, Mary Ann, the said principal sum to be equally distributed among my heirs at law."

"*Eighth.* All the rest and residue of my real and personal estate I give, devise and bequeath unto my said five children, share and share alike, to be held, controlled, paid and distributed in the manner and upon the conditions above mentioned, and such distribu-

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tion shall not take place until my youngest child living shall have arrived at the age of twenty-five years."

The executors failed to invest the sum required by this seventh clause, but held and controlled the estate in their own hands during the life-time of the testator's wife, and regularly paid her the annuity of \$600, directed by the will, during her life. One of the testator's sons, living at the testator's death (Erastus C. Root), married and died in 1865, intestate, leaving his widow, Helen Root, now Helen Stewart, him surviving, who was appointed administratrix of his estate, and is one of the respondents in this case. In the distribution of the estate of Chandler Root, the surrogate treated so much of his estate as was devised in the seventh clause of his will, as a vested estate at the testator's death, and the children of the testator then living, as intended in the words "my heirs at law." In this I think the decree was right, if the estate then vested, the children were then the only parties in whom it did vest, and it vested in them as tenants in common, and the subsequent death of one of the beneficiaries prior to the day of distribution, when the latter day is a day certain to happen on the death of an individual entitled to the precedent estate, does not cause the estate to lapse, but it goes to the heir or representative of the legatee. *Charles Saxton's Estate*, 1 Tucker, 32; *Barker v. Wood*, 1 Sandf. Ch. 131, and cases cited. There are some other technical questions raised, but they do not possess sufficient merit to require review. We have, at this term, in another case (*McKinstry v. Sanders et al.*, ante, p. 187), disposed of all the questions arising in this case, adversely to the claim of the appellants in this case. I think the surrogate's decree should be affirmed.

*Decree affirmed.*

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DAVIS, plaintiff in error, v. PEOPLE.

*Evidence — death from abortion — declarations of deceased, when admissible.*

To constitute an offense under the first section of the Abortions act of 1872 (Laws 1872, chap. 181, § 1) the death of the mother or child is essential, and the dying declarations of a person upon whom an abortion has been produced, concerning the circumstances of the act, are therefore admissible against one charged with the offense.

But declarations made after the act, when the person making them is not in a dying condition, are not admissible.

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THE prisoner was indicted at the Otsego oyer and terminer on the 20th day of September, 1872, for advising and procuring one Clara Penry to submit to the use of an instrument by one William T. Crandall, with the intent to produce the miscarriage of the said Clara Penry, and the indictment charged that the death of the said Clara Penry and that of the child was produced by the use of the instrument.

He was tried upon the indictment, at the oyer and terminer held in June, 1873. After the jury had been sworn, and before the case had been opened for the people, the prisoner's counsel moved to quash the indictment on the ground that the offense was alleged to have been committed in the town of Brookfield, in county of Madison, etc., which motion was denied.

The prisoner's counsel then asked the court to quash the third count in the indictment, on the ground that it contained two distinct and separate offenses, and was bad for duplicity, which motion was also denied and an exception taken. The people then called Mrs. Phebe Penry, who testified, among other things, that the defendant and his wife came to her house on Sunday afternoon, the 7th of July, and that Clara Penry went away with him in a buggy for the purpose of having an abortion produced, and returned about one o'clock in the night; that the witness did not see the defendant to speak to him, and that he did not come into the house when he came back. The district attorney then offered to show that Clara stated to the witness upon her return what had been done to her while she had been away, which was objected to by the prisoner's counsel. The objection was overruled by the court, and the counsel duly excepted. The witness testified to what Clara said had been done. After some other evidence had been given by the same witness, the district attorney offered to show the dying declarations of Clara Penry, which were objected to by prisoner's counsel. The objections were overruled by the court, and the prisoner's counsel excepted. Evidence of dying declarations was then given, under the objection of counsel. After other evidence had been given by the people, and evidence given by the prisoner, the court charged the jury, who retired, and on returning into court, rendered a verdict of guilty.

The prisoner's counsel then moved the court in arrest of judgment, which motion was denied. The prisoner was then sentenced by the court to imprisonment in the State prison for four years. A

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bill of exceptions was made and settled, and a writ of error allowed.

*J. A. Lynes*, for plaintiff in error.

*S. A. Bowen*, district attorney, for people.

MILLER, P. J. It is insisted that the court erred in admitting the dying declarations of Clara Penry, the girl upon whom the abortion was produced, and in charging the jury, that in determining the defendant's guilt, they had a right to consider such dying declarations.

Under the statute in question (Laws of 1872, chap. 181, § 1), for the violation of which the prisoner was indicted, the death of the mother or of the child is the substance of the offense, and without the death of the one or the other, no crime is made out within this provision. This is a gravamen of the charge, without proof of which it is not complete or consummated. True, the administering, or the prescribing, or the advising, or procuring a woman to take medicine, and the use and employment, or advising or procuring her to submit to the use or employment of any instrument or other means, with the intent to produce a miscarriage, is an essential and an important part of the crime; but all of those do not establish an offense under this section, unless death ensues. While these acts may, perhaps, be punishable of themselves, and constitute a crime under other provisions of law, they do not establish the entire offense charged in the indictment, and it is not made out, unless the death of the child or the mother ensues and is proved.

Even if these elements are preliminary to and a portion of the crime, it cannot be denied that the death of the mother or of the child as a consequence of them is the main feature, and the substance, without the existence of which it is incomplete. Such being the case, the dying declarations were competent within the rule laid down in the authorities, that they are admissible when death is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. 1 Greenl. Ev., § 156.

There is no force in the objection that the indictment is bad, because the offense is laid in the county of Madison, nor in the

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point taken, that the third count should have been quashed, upon the ground that it contained two separate and distinct offenses.

We are, however, of the opinion that the court erred in admitting evidence of the declarations of the deceased after her return home with the defendant. We think that they did not constitute a part of the *res gestæ*, and were not admissible as the acts and declarations of a conspirator, for the purpose of showing the prosecution of a common design, and carrying out the unlawful combination. Every thing had been done to produce the abortion, and hence the declarations were after a crime had been actually committed. True, the abortion had not yet been produced, nor had death ensued as its consequence, but these were the results of what had been done, and did not constitute a part of the act perpetrated in committing the crime. It is also true that medicine was administered before the abortion was procured, and directions were given as to the lying-in of the deceased, and as to her treatment; but the evidence fails to show that these constituted any part of the act necessary to complete the offense. And here lies the distinction, that, as the evidence stood, the declarations proved were after every thing had been done to accomplish and to consummate the crime, and not before, and hence they were inadmissible, and the court erred in its decision.

For the error last stated, the conviction must be reversed, and a new trial ordered at the Otsego oyer and terminer.

*Conviction reversed and new trial ordered.*

# THIRD DEPARTMENT.

GENERAL TERM, DECEMBER, 1873.

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FOOTE, plaintiff in error, v. PEOPLE.

*Excise law — selling without license — penalty.*

Upon a conviction under an indictment for selling intoxicating liquor without license, in violation of Laws 1857, chap. 628, § 13, the judgment must be for the amount of fine and the time of imprisonment prescribed by § 29 of the same act, and the court has no discretion.

The penalty provided by § 18 for selling without license is merely that recoverable in a civil suit, and the party violating that section is also amenable to the criminal penalties for offenses in violation of the act provided in § 29

WRIT OF ERROR to the Delaware county sessions. The defendant was indicted for selling intoxicating liquor without license. He was tried at the June sessions, 1873, found guilty and sentenced to be imprisoned in the county jail for ninety days, and pay a fine of \$100. The other facts will sufficiently appear in the opinion.

*G. W. Clark*, for plaintiff in error.

*F. Jacobs*, district attorney, for people.

P. POTTER, J. Before the trial a motion was made to postpone it to obtain a witness, which, I think, was discreetly denied. Also, a motion was made upon affidavits to quash the indictment upon the ground of irregularity and misconduct on the part of one of the grand jurors who found the indictment. This was met by opposing affidavits, denying the improprieties charged, and the denial of this motion, I think, cannot be justly challenged. A like motion was made at the close of the evidence, based upon the evidence and also upon the affidavit previously read, which was properly denied.



Also a motion in arrest of judgment, upon the same grounds, which was denied.

The main ground upon which the writ of error depends is that the court held that the amount of punishment adjudged was an imperative direction of the statute, and that the court had no discretion to reduce it. This, then, leaves the case upon the single question of the construction of the 29th section of the statute of 1857, chap. 628, entitled "An act to suppress intemperance and to regulate the sale of intoxicating liquors."

The act of 1857 is a prohibitory act in more than one sense. It forbids certain acts under certain penalties, to be sued for in the civil courts, and it also denominates or declares certain acts, and some of the same acts, to be misdemeanors, and provides the punishment to be inflicted therefor in the criminal courts. It is one of the peculiarities of this statute that it declares *particular offenses* to be misdemeanors, and prescribes limited punishment therefor, and afterward, by the 29th section thereof, declares *all offenses* against the provisions of the act to be misdemeanors, and seems to provide a more extended punishment for all offenses against the provisions of the act. This has given rise to doubts as to the proper construction to be given to certain sections of the act.

The case at bar, however, seems to call for construction of only 13th and 29th sections. We need not go further. The defendant in the indictment was a tavern or hotel keeper, but had not taken out license to sell strong or spirituous liquors or wines in quantities less than five gallons, and under §§ 13 and 22 was liable to a civil action in the name of the commissioners of excise, to recover a penalty of fifty dollars; and the act of selling in violation of this section was called an offense. By § 29 it was declared as follows: "It shall be the duty of courts to instruct grand jurors to inquire into all offenses against the provisions of this act and to present all offenders under this act; and also all persons who may be charged with adulterating imported or other intoxicating liquors with poisonous or other deleterious drugs or mixtures, or with selling the same; or with knowingly importing or selling intoxicating liquors or wines adulterated with poisonous or deleterious drugs or mixtures; which offenses are hereby declared to be misdemeanors, to be punished by imprisonment in the penitentiary, work-house or jail, for a period of three months, and by a fine of one hundred dollars."

By the plain reading and letter of this section *all offenses* against

the provisions of this statute are declared to be *misdemeanors*. This must include the charge set forth in the indictment. That it would also have been indictable, without declaring it a misdemeanor, seems to have been settled by judicial construction. See *Behan v. People*, 17 N. Y. 520; 2 R. S. 702, § 32; 3 id. 990 (3d ed.), § 43. It was an offense, because prohibited by statute.

It is unnecessary for us to discuss the question here as to the construction which should be given in the case of a conviction had under some other section of the same act, as, for instance, under the 20th section, which prescribes a less amount of punishment than section 29 for the violation of the particular offense therein declared to be a misdemeanor. That is also one of the offenses included in the words "all offenses" against the provisions of the same act, and would be included in the language "*all offenses*," of the 29th section.

Whether an indictment for the offense specified in section 20, for which a specific punishment is prescribed, could be punished to the extent of punishment mentioned in section 29 for *all offenses* against that act, is not before us to be decided. It is sufficient for this case that the offense named in the 13th section, upon which the indictment was found, specifically prescribes no criminal punishment, and can only be reached criminally by section 29. I therefore find no difficulty in holding that the punishment provided by the 29th section applies to this case, and that no discretion is conferred upon the court to change the positive requirement of the statute in that respect. *People v. Gilkinson*, 4 Parker Cr. 26, 31, 32, per EMOTT, J. See, also, 6 Parker, 669, a general term decision.

The penalty provided by the 13th section of this statute cannot be held to be all the punishment intended by the legislature. That penalty is merely the extent of the claim in the civil action. The language of the 29th section providing the punishment would, if not applicable to this case, be without meaning or application. This is never to be presumed in the construction of a statute.

I think this offense would have been indictable at common law, even if no penalty had been annexed to section 13. Dwarris lays down the rule "that when a statute commands or prohibits a thing of public concern, the person guilty of the disobedience to the statute, besides being amenable in an action to the party injured, is likewise liable to be indicted for the disobedience. Amer. ed. 161; *Rex v. Davis*, Sayers, 163.

If we follow what seems to be a settled authority in the construc-

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tion of the statute in question, we do not see a reason for reversing the judgment. The result is, the writ of error must be dismissed, a new trial denied, and the judgment must be executed.

*Judgment and conviction affirmed.*

MILLER, P. J., and PARKER, J., concurred.

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MORRIS, plaintiff in error, v. PEOPLE.

*Excise law — selling without license — discretion of court — penalty.*

Upon a conviction for the violation of the provisions of the excise law, in selling intoxicating liquors without license (Laws 1858, chap. 628, § 13), the court has no discretion in regard to the punishment, but must impose that provided by § 29 of the law.

*Foot v. People, ante, p. 216. followed.*

WRIT of error to the Washington county sessions. The plaintiff in error was indicted for, and convicted of, a violation of the excise law, in selling liquors in quantities less than five gallons at a time, without a license. The counsel for the prisoner asked the court to exercise its discretion as to the punishment or sentence of the defendant. The court held that it had no discretion; that under the 29th section of chapter 628, Laws 1857, the punishment prescribed was imperative and fixed at imprisonment for three months and a fine of \$100, and accordingly sentenced the prisoner to that punishment, to which holding and opinion and sentence the counsel for the prisoner excepted.

*Charles Hughes*, for plaintiff in error.

*R. C. Betts*, district attorney, for defendant in error.

P. POTTER, J. The only question in this case is, as to the discretion of the court in the amount of punishment to be awarded, on conviction, for the offense named.

The act complained of was in violation of the 13th section of the act which prescribed a civil penalty of \$50. The selling of liquors, in violation of this section, is prohibited, and it was well settled by adjudication of the courts long before the passage of the act in

question and under the excise laws of the State, containing similar provisions, that selling prohibited quantities of intoxicating liquors, without license, were *offenses* against the provisions of the act, and therefore misdemeanors and indictable, notwithstanding the offender may have been sued in a civil action and the penalty collected. *People v. Stevens*, 13 Wend. 341; *People v. Brown*, 16 id. 561. By the 29th section of the act of 1857, all offenses against the provisions of that act are expressly declared to be misdemeanors.

This express provision was not necessary, according to the previous decision of the court; but being expressed in terms, the question is no longer debatable. The only criticism now attempted upon the 29th section is, that of a distinction between terms *offenses* and *misdemeanors*, having a different meaning when applied to different sections of the same act. The force of this argument is destroyed by the language of section 29, which expressly makes all offenses against this act misdemeanors. Certainly the act for which the plaintiff in error is convicted is an offense, but the question presented in this case is *res adjudicata*. On two cases in this court (*People v. Sleight*, not reported; *Foot v. People*, ante p. 216, decided at this term;) *Behan v. People*, 17 N. Y. 516; *People v. Gilkinson*, 4 Park. 26, all concur in the same construction of this statute. It was the clear intent of the legislature, as appears from the whole scope of this statute, to make its provisions what its title proclaims: "An act to suppress intemperance, etc.," the sooner the public mind is made to know that this law will be fully enforced according to its letter and spirit, and that the courts will sustain and enforce its positive provisions, the better it will be for the public good. If this statute is wise and good, as the courts are bound to presume, from its being the legislative expression, it should be enforced, even though such enforcement may become a terror to those who intend to live upon the gains made by corrupting public morals, or at the expense of the public peace and public health. The writ should be dismissed; the judgment affirmed and ordered to be carried into execution.

*Ordered accordingly.*

MILLER, P. J., and PARKER, J., concurred.

YALE *et al.* v. TRAVELERS' INSURANCE COMPANY OF HARTFORD  
appellant.

*Evidence—accident insurance—death while fighting—declarations of deceased.*

A policy of insurance against accident, etc., was conditioned that no claim should be made under it if the death or injury should be "caused by dueling, fighting," etc. ("except in cases of perilous necessity"), or should happen "by unnecessary exposure to danger or peril," "or when engaged in any unlawful act." The insured was killed in a fight about the possession of certain premises, the title to which was in dispute between him and another.

In an action upon the policy, *held*, that threats made previous to the fight by the insured against the person disputing his title, were admissible upon the questions as to whether the death of insured happened by an unnecessary exposure to danger or occurred while he was engaged in an unlawful act.

EXCEPTIONS ordered to be heard in the first instance, at the general term, after verdict for plaintiffs at the circuit.

The action was brought upon a policy of insurance against accident and death for \$5,000, dated January 1, 1868, upon the life of Elliott J. Kidder, who died of a pistol-shot wound, on the 10th of February, 1868. The plaintiffs are the children of the deceased, and the payees of the policy. The action was begun October 17, 1868. It was tried before Mr. Justice BOARDMAN, and a jury, at the Chenango circuit, February 24, 1870, and resulted in a nonsuit of the plaintiffs upon the ground that the premium had not been paid, and the evidence failed to show that credit for payment had been given. Upon exceptions heard in the first instance, at the general term in January, 1872, the nonsuit was held erroneous, and a new trial was ordered. It was tried a second time, on the 26th of November, 1872, before Mr. Justice BALCOM, and a jury, and upon that trial the plaintiffs had a verdict of \$6,494.31. Defendant moved on the minutes, for a new trial, which was denied, and the exceptions ordered to be heard in the first instance, at the general term. The other material facts appear in the opinion.

*H. R. Mygatt*, for plaintiff.

*W. J. Hadley*, for defendant.

P. POTTER, J. Among the conditions of the policy were, "that no claim should be made under it when the death or injury may

have been caused by dueling, fighting or wrestling ; or by over-exertion, or lifting (except in cases of perilous necessity)," \* \* \* "or when the death or injury may have happened by unnecessary exposure to danger or peril," \* \* \* "or when engaged in any unlawful act."

There were many other grounds of defense relied upon, but most, if not all, of them, were correctly disposed of by the judge or jury at the trial.

It is not necessary, in the view we take of the question at issue, and in the voluminous evidence of the case, to consider any others than those arising under the conditions of the policy above stated.

A principal ground of defense was, that the death of Elliot J. Kidder, the assured, was caused by fighting with one Robert Corbin, and others, and that Kidder unnecessarily exposed himself to danger and peril, and that his death happened while he was, and in consequence of his having been, engaged in an unlawful act.

Kidder, the assured, was shot, and his death caused by one Robert Corbin, upon a lot of wild land in the town of Afton, Chenango county, the title of which lot was in dispute. Kidder claimed to be the owner, and in possession, and one Creswell claimed also, to be the owner under a deed from this same Robert Corbin. On the day of the homicide, Kidder had gone in the forenoon upon the premises with a team, where he had men who had been engaged for days in cutting and hauling saw-logs from the premises. In the afternoon of the same day, Corbin, with five or six others, entered upon the same lot with teams and proceeded upon a road that had been cut out thereon, until they reached the point where the homicide occurred. It is sufficient to say, for the purposes of the discussion we make, that upon the question of who commenced the fight that ensued — who was most in fault, and whether the assured did any act not justified in law — there was great conflict in the evidence and the testimony, altogether too voluminous to be analyzed. The testimony upon this question seems to have been fairly submitted to the jury, and their finding would be conclusive, if no errors had been committed by the judge in the admission or exclusion of proper evidence, which is the only point we propose to consider. Corbin, who committed the homicide, had been tried therefor, and convicted of manslaughter in the third degree. It may be seen from the conditions in the policy, and from the defense interposed in this case, that it may have been that

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important questions arose on the trial as to whether the death of the assured occurred by fighting, in a case where there was no perilous necessity, or occurred by an unnecessary exposure of the assured to danger or peril, or whether it occurred while he was engaged in any unlawful act.

The homicide by Corbin, therefore, might be more or less justified or excused by the belief he entertained at the time of the intent of the assured to take his life. So, too, the unlawfulness of the act of the assured, may be proved by his declarations of intent previously made to do such an act, and so, also, the declarations of the assured may be evidence to characterize the act of fighting as to whether it was a case of perilous necessity. On the trial, a witness was asked: "Did you ever inform Corbin of any threats Kidder had made against him?" The counsel for the plaintiff objected to the question. The court said: "I do not see the object of the evidence." The defendant's counsel offered to prove that Kidder had made threats against Corbin, and that this witness had informed Corbin of those threats. Plaintiff's counsel objected to the evidence, on the ground that it was offered to prove a transaction of a different date. The objection was sustained by the court, and the defendant's counsel duly excepted. The court said: "You may prove any threat made by Kidder to Corbin in this transaction." Defendant's counsel said: "I offer to prove threats made in the month of December, before the homicide." The court: "That is not material and is rejected." Defendant's counsel excepted. Again, to another witness, the defendant's counsel asked this question: Q. "Did you at any time hear Mr. Kidder make any threats against Mr. Corbin?" A. "I did." Objected to by plaintiff on the ground that it was incompetent, irrelevant and immaterial. The objection was sustained by the court, and the defendant's counsel excepted. The defendant's counsel then offered to prove threats made by Kidder in the village of Bainbridge, a short time before the homicide, "That if Corbin went upon the hill he would be shot down, and if he could not get any body else to do it, he (Kidder) would do it himself." The evidence was objected to "on the ground that it was incompetent, irrelevant and immaterial." The objection was sustained by the court, and the evidence excluded, and the defendant's counsel duly excepted to such decision.

I am inclined to think this ruling was error. Since the case was tried, the case of *Stokes v. People* has been decided in the court

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of appeals (June 10, 1873), not yet reported, but the manuscript of the opinion delivered is before me. That was a criminal case, but the principle, it seems to me, was the same, and the decision below there, as here, was the same. It was an offer to show threats made by the deceased against the accused, prior to the time of the homicide, and communicated to the accused. The court say: "In determining the competency of this testimony, it must be borne in mind that evidence had been given making it a question for the jury whether the case was one of excusable homicide, upon the ground that the act was perpetrated by the accused in defending himself against an attempt by the deceased to murder or inflict some great bodily injury upon him, and the further question, whether it was not perpetrated in resisting an attack made upon him by the deceased, from which he had reasonable grounds to apprehend a design to murder or inflict upon him some great bodily injury."

The testimony so offered and rejected in the case of Stokes was held to be admissible. I am unable to see why, upon principle, the testimony in the case at bar is not within the same rule. It is upon this ground, we think a new trial must be granted, costs to abide the event.

*New trial ordered.*

MILLER, P. J., and PARKER, J., concurred.

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SEARLS V. VIETS *et al.*

*Arrest — what constitutes.*

To constitute an arrest which if unlawful is sufficient to maintain an action for false imprisonment, an actual manual touching of the body is not required, but only whatever is equivalent amounting to a restraint of liberty of the person.

In an action for false imprisonment it appeared that R., a constable, having a warrant for plaintiff and his sons, issued by a justice, met the plaintiff and one of his sons in a wagon. R. said: "I have a warrant for you and your two sons." Plaintiff asked for what. R. replied, "for stealing pumpkins." Plaintiff started to get out of the wagon, and R. said: "You can go home and get your horses put up and take your tea and come down." Plaintiff went home, took his tea, employed a lawyer, and with him and his two sons went to R.'s, and calling out R., said, "Here's your prisoners." R. said: "You move on and I will overtake you." They went on, and R. overtook



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them as they got to the house of the justice. The matter was then, after discussion, adjourned to another day, without bail, and on the adjourned day the plaintiff appeared, an examination was had, and the justice discharged the case. *Held*, that the evidence showed an arrest of the plaintiff.

MOTION by the plaintiff for a new trial on exceptions ordered to be heard in the first instance, at the general term. The action was for false imprisonment. The defendant Viets is a justice of the peace. One Becroft, at the request of the other defendant, Cronk, made an affidavit upon which Viets, the justice, issued a warrant for larceny against the plaintiff and two of his sons. Cronk delivered the warrant issued by Viets to the constable, and at the time made remarks of a threatening character against the plaintiff. The affidavit upon which the complaint was made set forth no offense. The warrant was defective, and the justice had no jurisdiction of the case. On examination, he dismissed the complaint.

This action was brought December 16, 1869. It was tried, and the plaintiff had a verdict, which was brought before this court for review, and a new trial was ordered at January term, 1872. Upon the second trial the plaintiffs were non-suited, in obedience to the ruling of the general term, that no arrest had been made of the plaintiffs under the warrant. The other necessary facts appear in the opinion.

*Ezek Cowen*, for plaintiff.

*R. A. Parmenter*, for defendant.

P. POTTER, J. This is an action in which the plaintiff claims to recover damages for being falsely imprisoned by the illegal acts of the defendants. If the plaintiff was imprisoned, it was a technically constructive imprisonment, not an actual and manual restraint of liberty and locomotion by actually seizing his person. But, perhaps, a constructive arrest is sufficient to sustain an action for false imprisonment. The single question, then, in this case, is: Was there a constructive imprisonment of the plaintiff by the constable Rice, to whom the warrant in question was delivered? When this matter was here before, upon not so strong a case, yet substantially upon the same evidence, the case was then quite imperfectly presented. This court then held, that upon the authority of *Arrow-*

*smith v. Messurier*, 2 Bos. & Pull. N. R. 211, and *Berry v. Adamson*, 6 Barn. & Cress. 528, an arrest had not been proved. It is claimed now that by the American authorities the law is otherwise, and we are asked to review our ruling upon authorities then overlooked. We do not decide it upon this ground.

I have not been able to find any real conflict between English and American authorities as to what constitutes an arrest. By all the authorities a person may, or may not be arrested, without a manual or actual touching by the officer. Each case must depend upon its own peculiar circumstances. Bare words alone will not make an arrest, if the party resists the arrest.

This was held in *Genner v. Sparks*, 1 Salk. 79. Genner, a bailiff had a warrant against Sparks, and went to him in his yard, and told him he had a warrant for him, and said, "I arrest you." Sparks had a fork in his hand, and kept the bailiff from touching him. Neither the power to arrest, nor the words, "I arrest you," made an arrest; but the court said, if the bailiff had touched him, that had been an arrest, and the bailiff might have pursued him, broken open his house, or had an attachment and rescous against him. See, also, *Russen v. Lucas*, 1 C. & P. 153; *Chinn v. Morris*, 2 id. 360. In another case, however, in *Horner v. Battle*, Bull. N. P. 62, it was held that the words, "you are my prisoner," "I have a writ against you," was a sufficient arrest, where the prisoner submitted, turned back and went with the officer, though there was no touching; but it was also said, if the defendant, instead of going with the bailiff, had fled from him, the words and the warrant would not have made an arrest. To the same effect, see, also, *Pocock v. Moore*, Ryan & Moody, 321.

In the case of *Arrowsmith v. Messurier*, Sir JAMES MANSFIELD, Ch. J., says: "I suppose an arrest can take place without an actual touch," and refers to the case of *Williams v. Jones*, Cas. Temp., Hard. 298, where a bailiff comes into a room and tells the defendant he arrests him and locks the door; that is an arrest without touching, for he is in the custody of the officer. "But," (the Ch. J. remarks) "here the plaintiff went voluntarily before the magistrate. The warrant was made no other use of than as a summons. The constable brought a warrant, but did not arrest the plaintiff."

So the case of *Berry v. Adamson*, *supra*, "A sheriff's officer, to whom process was given, sent a message to the defendant and asked him to fix a time and call and give bail, and he accordingly fixed a

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time, went and gave bail. *Held*, that this was not an arrest, although the party suing out the writ had no cause of action. And, it was said, that an action for the arrest would not lie." Lord Ch. J. TENDERDEN held that the plaintiff had been neither *actually* or *constructively* arrested.

The American authorities, which are claimed to be in conflict, are *Gold v. Bissell*, 1 Wend. 210. In this case the constable took the warrant, went to Bissell and informed him what he had. Bissell submitted without a manual touching; went with the constable about half a mile; procured a person to become his bail next day, and did appear and give bail. The court, per Ch. J. SAVAGE, say, "We understand the law to be well settled, that *no manual touching of the body* is necessary to constitute an arrest and imprisonment. It is sufficient if the party be within the power of the officer and submits to the arrest." I am unable to see any conflict between the English cases and this.

So, too, the case of *Mowry v. Chase*, 100 Mass. 79. In this case there was a conflict of fact before the jury, as to an arrest; the defendant swearing that the officer did not make the arrest, but only informed him he had a writ; that he then inquired for the plaintiff, and was informed that he was outside of the railroad station; that he then went and settled the affair. The officer swore that, upon defendant being pointed out to him, he stepped up to him, put his hand on his shoulder, and told him he had a precept for him, and read the writ to him; the defendant asked him what he was to do, and the officer told him he must either give bail or he would commit him to jail, etc. Upon this conflict of fact it was submitted to the jury, and the judge charged that no actual force or manual touching of the body was necessary to constitute an arrest; that if the officer had a precept which authorized an arrest, and gave defendant to understand *that he was arrested thereon, or under restraint*, and if the defendant did so understand and submitted to the custody and control of the officer, and the defendant's movements were directed by the officer, no matter for how short a time, this was a legal arrest. On appeal, the court held this charge to be sound. The jury found an arrest. This authority, it seems to me, sustains as well the English cases, as also the case in Wendell.

We are also referred to *Pike v. Hanson*, 9 N. H. 491. That was the case of an officer, with a collector's warrant for the pay-

ment of taxes, with power of arrest. He called upon the plaintiff, after having given her due notice; being in the room with her, called upon her to pay her tax, which she declined doing until arrested. *He then told her he arrested her*, but did not lay his hand upon her, and thereupon she paid the tax. In an action for false imprisonment, the case being carried to the court in bank, all the English authorities above cited, as well as the case of *Gold v. Bissell*, in 1 Wend., were reviewed, and this was held to be a sufficient arrest to sustain an action. The judge questions, but does not condemn. *Arrowsmith v. Messurier*. He distinguishes it from the other cases, by saying there was no declaration of arrest by the officer, and that the warrant was, in fact, only used as a summons, and says, if it cannot be sustained upon this distinction, it must be regarded as of doubtful authority. The case of *Emery v. Chesley*, 18 N. H. 202, adopts the law as laid down in the preceding case.

It is seen, upon a review of the preceding cases, though each differs from the others, that but one rule can be laid down as to what "constitutes an arrest, which, if unlawful, is sufficient to maintain an action for false imprisonment." I think, by the modern practice, as drawn from the cases, that an actual manual touching of the body is not required, (but only whatever is equivalent, amounting to a restraint of liberty of the person, as when the officer or other person claims the right to exercise the power of arrest, is in possession of a precept which authorizes or directs an arrest, and gives notice of the intention to execute it; or, if the officer goes for the purpose of executing his process, and has the party in his presence and power, if the party so understands it, and in consequence thereof submits, and allows the officer to direct his movements without resistance, as by going before a magistrate by direction of the officer; that amounts to an arrest, though the officer did not touch his body.

Applying the facts of the case at bar to this proposition, as the case now appears, on the second trial, I think a constructive arrest was made; an arrest sufficient to sustain the action was made out. The constable, Rice, had a warrant for the plaintiff and his two sons, and, according to the testimony of the plaintiff, which we must assume to be true, on a motion to nonsuit, he, the plaintiff, and one of his sons were passing the constable's place, when the constable came out and said, "I have a warrant for you and your two sons." "I asked him for what?" he said, "for stealing pumpkins."

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\* \* \* "I got off the seat and got my foot on the wheel to come off." \* \* \* He said, "you can go home and get your horses put up and take your tea and come down." The plaintiff then went home, took tea, employed a lawyer, and, with him and his two sons, went down to the constable's. Plaintiff called him out. Says I, "Rice, here's your prisoners." \* \* \* He (after going back), says to me, "you move on and I will overtake you." "We moved on, slowly, and when we got out to the corner of the plantation, where Mr. Viets (defendant, the justice who issued the warrant), lived, he overtook us. We went in together." After some discussion before the justice, the matter was adjourned to another day, without requiring bail. On the adjourned day, the plaintiff appeared. An examination was had upon testimony of witnesses, and the case was discharged. The case is now stronger than it was before in favor of the plaintiff. I think that what was done was equivalent to an arrest, that a constructive arrest was made by the constable, and that the judge at the circuit erred in dismissing the case, at least as against the defendant Cronk.

The result is, that a new trial must be granted; costs to abide the event.

*New trial granted.*

MILLER, P. J., concurred.

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 PATTON, appellant, v. DODGE.

*Evidence — account — reading to witness evidence already given.*

In an action for money loaned, the fact of the loan was denied, and defendant examined witnesses to show that both plaintiff and defendant belonged to the same regiment; that the money in question was used in raising the regiment, and that plaintiff had presented an account for the same sum to the council of officers, and it had been allowed. It appearing that the account was in writing, plaintiff objected on the ground that the account itself should be produced, but the referee allowed the evidence. *Held*, no error. Upon an examination in chief a question put to a witness was objected to, whereupon, and before the question was announced, the counsel conducting the examination proposed to read to the witness his evidence already given on the same subject, but the referee refused to allow it to be done. *Held*, no error.

APPEAL, from a judgment in favor of defendant entered upon the report of Benjamin H. Hall, Esq., referee.

The action was brought to recover an alleged balance of \$319, claimed to be due the plaintiff from defendant on account of a loan of money.

The answer was, 1st. A general denial; 2d. Payment; 3d. Accord and satisfaction; 4th. Arbitrament and award.

The referee found two facts: 1st. That the plaintiff did not lend or advance to defendant, nor did defendant borrow or receive from plaintiff, the sum of \$404, or any other sum on the 29th of January, 1863; 2d. The defendant is not indebted to the plaintiff for any sum of money or interest whatever.

*E. F. Bullard*, for appellant.

*E. L. Fursman*, for respondent.

P. POTTER, J. If the judgment is erroneous, it is on account of some ruling of the referee made on the trial. The first objection arises upon the testimony of one of plaintiff's witnesses. After a somewhat lengthy examination by plaintiff's counsel he was asked a question which the defendant objected to. Whereupon, before the question was answered, plaintiff's counsel proposed to read to the witness his testimony already given. This was objected to by the defendant, and the objection sustained; as I think properly.

The next objection arose on defendant's proof that all the officers of the regiment, of which plaintiff was one, had an agreement among themselves about the expenses of raising a regiment of men, and that the plaintiff's claim arose out of money raised for such expenses. The witness was testifying as to this agreement, by stating a conversation between the officers of the regiment. Plaintiff's counsel objected to the evidence because plaintiff was not present. Defendant's counsel then stated that he expected to connect the plaintiff with the contract testified to, with the understanding that if he failed to do so, the evidence should be stricken out. The testimony was received. There was subsequent evidence of plaintiff's assent to this arrangement, and no motion was made to strike out the evidence admitted.

The plaintiff also took exception to the ruling of the referee in permitting one of the witnesses to testify whether a certain account which plaintiff had presented against the regiment for audit, to a

## Campbell v. Seaman.

council for that purpose, contained a claim for the sum of \$404, on the ground that the account itself, which was the best evidence, should be produced. The evidence asked for was only secondary evidence in the case, and it is not within the rule of the cases where the instrument is the basis upon which the issue depends. See *Chrysler v. Renois*, 43 N. Y. 212, and cases cited. And the same rule seems to apply to all the objections to the same character of evidence, under the third point of the plaintiff.

There are several other objections and exceptions taken by the plaintiff to the ruling of the referee, which taken abstractly, separated from other matters in the case qualifying or affording a reason for the decision, might seem technically to be error. But upon examination of the whole case, together, there is found no such erroneous rulings as require a reversal of the judgment.

*Judgment affirmed.*

MILLER, P. J., concurred.

CAMPBELL *et al.* v. SEAMAN, appellant.

*Nuisance — burning brick with coal — prescription — what necessary to maintain action.*

Plaintiffs are the owners of improved lands, which they have been engaged in beautifying since 1857. Defendant is the owner of a brick-yard adjoining, upon which he burned brick by the use of mineral coal as a fuel, and in so doing sulphurous acid gas, which is poisonous to vegetation, was generated in quantities. When the south wind blew while the kilns were burning, this gas was carried upon the plaintiffs' land, and it had, by repeated attacks, destroyed many of their ornamental trees. Defendant's premises had been in use as a brick-yard, though not uninterruptedly, since before plaintiffs purchased their land, and for more than twenty-five years. *Held*, that plaintiffs were entitled to an injunction to restrain the defendant from using mineral coal in his process of burning brick. The maxim *sic utere tuo ut alienum non laedas* construed.

A right to commit a legal nuisance cannot be acquired by prescription.

In an action for nuisance it is sufficient to show that the premises affected cannot be enjoyed without danger to health, or that their value is substantially impaired by the nuisance.

APPEAL by the defendant from a judgment entered upon the report of Hon. Charles Mason, referee. The case is substantially presented in the facts found by the referee, which are as follows:

The plaintiffs are owners of thirty to forty acres of land adjoining the village of Castleton, upon the Hudson river, about six miles below the city of Albany; there are native yellow and white pines upon the said land, which grew in the forest, many of the most comely of which have been saved by the plaintiffs as a protection against winds and as an ornament to the grounds.

Plaintiffs have caused many of the forest trees to be removed, and have greatly ornamented and improved the said grounds by making gravel roads and walks through the same, and by planting Norway spruce and other ornamental and shade trees, and have erected an elegant dwelling-house upon the said premises, with barns and other out-houses, and therein have laid out large sums of money, and have made thereon a fine garden for grapes, plums, etc. Said grounds have been graded and terraced, and have been rendered very valuable by the moneys expended thereon by the plaintiffs.

The defendant, whose lands adjoin the lands of the plaintiffs, has, for two years or more, been manufacturing brick upon his own lands and adjoining the plaintiffs' said lands. In the manufacture of such brick he mixes anthracite coal dust with the clay and sand in molding his brick, and in constructing his kiln a portion of the brick are left out and the space filled with the anthracite coal dust. This is done in the outer portion of the kiln, and the object obtained is this: The coal dust, when the kiln becomes heated, takes fire and gives sufficient heat to burn the brick to the outer layers.

The burning of the kiln under this process causes a sulphurous acid gas, for at least the last two days of the burning, to escape from the kiln, which is very poisonous and injurious to persons who inhale it, and is very destructive to many kinds of vegetation.

The evidence in the case shows that this gas from the defendant's kiln has on several occasions killed the foliage on the plaintiffs' white and yellow pines, his Norway spruce, and has, after repeated attacks, killed and destroyed from one hundred to one hundred and fifty of his valuable pine and Norway spruce trees, and has injured his grape vines and plum trees.

The burning of brick on the defendant's premises by the use of anthracite coal dust does not affect the premises of the plaintiffs injuriously, except in case of southerly wind at the time of the burning, and such injuries have happened only at times, and not continually, while defendant has occupied said premises.

The evidence is very conclusive as to the destructive qualities of



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this sulphurous acid gas to the pine and Norway spruce trees, and to grape vines and plum trees. The plaintiffs have already suffered considerable damage from the defendant burning brick at his kiln, and, if continued, they must inevitably continue to suffer and their property be greatly depreciated in value.

The referee held that the case was one proper for an injunction to issue restraining the defendant from burning brick at the place named, by the process above described, in the use of anthracite coal or coal dust, and directed that a judgment be entered in favor of the plaintiffs and against the defendant, perpetually enjoining and restraining the defendant, his agents and servants, and all others acting under his authority, from burning brick at the place stated by the process above described, to the injury of the plaintiffs' property, and he adjudged that the plaintiffs recover of the defendant in this action the sum of five hundred dollars for the damages already done to their property by such burning of brick, and their costs of this suit to be taxed.

The defendant excepted to each of the above findings of fact and of law.

Judgment was entered accordingly.

At the defendant's request, the referee added other findings of fact, and refused to find certain other facts, to which refusals the defendant also excepted. Such of them as are material will be sufficiently referred to in the opinion.

*W. S. Hevenor*, for appellant.

*Martin I. Townsend*, for respondent.

P. POTTER, J. Several nice questions of law arise upon the facts in this case, which require careful examination, but I regard the leading and controlling feature of the case to be undisputed, settled, elementary law. It may be laid down as an established legal proposition that no person can even lawfully exercise absolute dominion over the land of which he is the owner.

His use and enjoyment of what he calls his own must always have reference to the rights of others, and be subordinate to general laws which are established for the protection and benefit of all. Under the limitations and restrictions to which general laws thus subject him, he will not be justified in using and appropriating his

estate in a manner which debar others, and the public at large from the lawful and proper enjoyment of their own contiguous estates. Yet, perhaps, it would be too broad a proposition to be held, that any thing, under every kind of circumstances, which lessens the comfort, or endangers the health or safety, of a neighbor, is actionable as a nuisance. All inconveniences and obstructions to others are not nuisances. Nuisance is a term that, in its effect, consists of degrees; it may be very great, or may be insignificantly slight. The maxim "*sic utere tuo ut alienum non laedas*" is not of so general application that there are not some exceptions in regard to what are not called nuisances; nor is it every annoyance to the comfort and enjoyment of living that is a nuisance *per se*, or that can be restrained or enjoined in equity. There are probably no exceptions to the application of this maxim, where the act complained of is done wantonly or maliciously, whether a nuisance or not; but where the act is caused in the ordinary and common use and occupation of property in a natural and usual manner, it must amount to a nuisance in order to be actionable.

Generally speaking, however, it may be said that every man has a right to the exclusive and undisturbed enjoyment of his own premises, and is entitled to proper and legal redress if this enjoyment shall be interrupted or diminished by the acts of others. But as we have said, it is not every interruption or annoyance, slight and temporary, that amounts to a nuisance, or that demands equitable interposition of the courts. The right of restraint, like the right to enjoy, is not, therefore, absolute and unlimited, but is, and must be, in the nature of things, subject to reasonable limitations, which have regard to the rights of others, as well as to the general public welfare. The compromises that belong to social life, and upon which the peace and comfort of it mainly depend, furnish an indefinite number of examples where some apparent natural right is invaded, or some enjoyment abridged, to provide for the mere general convenience or necessities of the whole community, and, therefore, all that the law can do is to lay down some general, and perhaps somewhat vague, propositions as to these respective rights. Each particular case, therefore, must be governed by its own peculiar circumstances.

There is found in the books of authority of different States and governments, a severe conflict upon the subject of the right of enjoyment of one's own estate free from interruption by others,

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and as to the extent of the right of redress, and the character of the cases to which the right of redress extends. Indeed, there is a severe conflict in the English authorities themselves as to such rights; and in Pennsylvania the rule in the reported cases is found in direct conflict with that in this State. What amounts to an actionable obstruction to the enjoyment of one's own property is sometimes held to depend upon the question whether the obstruction is wanton or malicious, or is, or is not, a nuisance; and even this question of nuisance does not seem to be determined by any well defined and settled rules. What is a nuisance in one case may not be such in another. A nuisance, as applied to real property, is defined to be "any thing done to the hurt or annoyance of the lands, tenements or hereditaments of another." Crabbe on Real Property, § 1067. And yet this is too general a definition to be established as a rule for all cases, or which will authorize the bringing of an action in every case coming within the strict letter of that definition. The lawful and rightful use of one's own property may, in many cases, so hurt or annoy a neighbor in the perfect and absolute enjoyment of the estate of the latter as to render it nearly valueless, and, therefore, the definition, I think, should be somewhat qualified, and the maxim "*sic utere*," etc., in such case should read, "so reasonably use your own property as not to injure another," and there should be a maxim to meet a reciprocity of rights of use and enjoyment between adjoining owners of property, to the effect, "*that every one must enjoy his own property, subject to the inconvenience necessarily resulting from the reasonable use by his neighbor of his own land.*"

A *reasonable* use can never be construed to include those uses which produce destructive vapors and noxious smells that result in material injury to the property, and to the comfort of the existence of those who dwell in the neighborhood.

The books are full of cases of this kind of actual nuisances, nuisances *per se*; as where a person keeps hogs or other noisome animals so near the house of another as to render the air unwholesome. *Rex v. White*, 1 Burr. 337. So, the exercising the trade of a tallow chandler is a like nuisance. *Morley v. Pragnell*, Cro. Car. 510. So, erecting a smithing house so near the land of another that the vapor and smoke kill his corn and grapes or damage his cattle. 1 Roll. Abr. 89. So, corrupting a water-course. *Aldred's Case*, 9 Co. 59.

A late case in the queen's bench in England, tried in 1862 (*Bam-*

*Jord v. Turnley*, 3 Best & Smith, 62), was an action for nuisance, arising from the burning of brick on the defendant's land, near the plaintiff's house, in which the plaintiff charged that the air was thereby greatly impregnated and filled with noxious and unwholesome vapors, fumes, stinks and stench, and became corrupted, offensive, unwholesome, unhealthy and uncomfortable, and inconvenienced the plaintiff and his family in the enjoyment, etc., of his dwelling-house and premises. It appeared on the trial that the defendant's land, and the land upon which the plaintiff's house stood, were portions of an estate which had been sold in lots as building land; that there was an abundance of brick earth and gravel, which, with other advantages, presented an advantageous opportunity of carrying out safe and profitable building operations. Bricks had previously been made on the spot where the plaintiff's house stood. The judge directed the jury that if they thought that the spot was convenient and proper, and the burning of bricks was, under the circumstances, a reasonable use, by the defendant, of his own land, the defendant would be entitled to a verdict. The case was carried up from the queen's bench to the exchequer chamber, where the charge was held erroneous, and judgment ordered for the plaintiff. This was held to be a nuisance, with damage. The creating such a nuisance, by this rule, is not the *reasonable use* of one's own property. I am not able to distinguish that case, in principle, from the case at bar.

The case last above cited was reaffirmed in England, in *Tipping v. St. Helen's Smelting Co.*, 4 Best & Smith, 116 Eng. Com. L. 608, afterward affirmed in exchequer chamber, in 1865. That was an action of nuisance to a messuage and dwelling-house, occasioned by noxious vapors from smithing works upon the lands of defendants. The judge, at the trial, laid down the law thus: "Every man is bound to use his own property in such a manner as not to injure the property of his neighbor, unless, by lapse of time, he has acquired a prescriptive right to do so. But the law does not regard trifling inconveniences. Every thing must be looked at from a *reasonable* point of view. \* \* \* The injury, to be actionable, must be such as visibly to diminish the value of the property, and the comfort and enjoyment of it," etc. In that case it had been urged that great benefits to the public resulted from the defendant's manufacture of brick. In reply to that argument COCKBURN, Ch. J., said: "It is new to me to hear that, without compensation, an individual

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is precluded from redress for private injury on account of a benefit to the public arising from that injury."

These cases are in harmony with the rule held in the cases in the courts of our own State. In *Fish v. Dodge*, 4 Denio, 316, in an action for an injury by nuisance, it was said, per BRONSON, J.: "It is not necessary to a right of action that the owner should be driven from his dwelling. It is enough that the enjoyment of life and property has been rendered uncomfortable."

This is not only the rule in our own but in other States of the Union. See *Catlin v. Valentine*, 9 Paige, 575; *Wesson v. Washburn*, 13 Allen (Mass.) 95; *Walker v. Shepardson*, 2 Wis. 384; *Hackney v. State*, 8 Ind. 494; and the cases collected in note to *Barnes v. Hathorn*, 7 Am. Law Reg. (N. S.) 86, 87. These, and the English cases above cited, are approved of as sound law in *McKeon v. See*, 51 N. Y. 306, 307.

This seems to be the most material point in this case, and I have, therefore, given it the most careful examination. The main reliance of the defense upon this point seems to be the case of *Huckenstine's Appeal*, reported in 70 Penn. St. 102, which it must be conceded is, in its general features, in direct conflict with the authorities of this State, and cannot be adopted here as law.

That case adopts this rule: "If a man lives in a town, of necessity, he must submit himself to the consequences of the obligations of trades which may be carried on in his immediate neighborhood, which are actually necessary for trade and commerce, also for the enjoyment of property and for the benefit of the inhabitants of the town."

Such a doctrine carried out, ignores the law of nuisance in all cases where it is more profitable to live by their creation and continuance, than by healthful employments. The maxim, "*Salus populi suprema lex*," gives place to a higher law of individual success. The defendant's first point is placed squarely upon the rule in the Pennsylvania case: "Brick making, say the court, is a useful and necessary employment, and must be pursued near to towns and cities where bricks are chiefly used."

There is sufficient evidence in the case at bar to sustain the findings of the referee as to location, and to the improved character and value of the plaintiff's estate, and of material injury by the defendant's employment; that the defendant's lands adjoin those of the plaintiff; that for two years prior to the date of the report, the

defendant had been engaged in burning brick on his said adjoining premises in kilns; that in manufacturing such brick, the defendant mixes anthracite coal dust with the clay and sand; that in constructing his kiln, he leaves out a portion of the brick, and fills the spaces with such coal dust; that the burning of brick under this process causes a sulphurous acid gas to escape from the kiln, which is very poisonous and injurious to persons who inhale it, and is very destructive to many kinds of vegetation; that it has killed and destroyed a very large number of ornamental and valuable trees of the plaintiff, and also injured his grape vines and plum trees; that the plaintiff has already suffered considerable damage, and, if the acts complained of are continued, must inevitably continue to suffer, and his property be greatly depreciated in value. A case so made out calls for legal defense, or judgment is a matter of right. These findings of fact, sustained by evidence, we think, must stand.

It is urged that even upon the facts as found, that the case is not one for perpetual injunction. I am unable to adopt this proposition. The injury is to property that must be perpetual. The enjoyment of the estate of the plaintiff, as a continued residence, is greatly impaired. His ornamental and shade trees that remain, and such as may be supplied hereafter, are intended to be perpetual; the injury to them is not temporary or casual, but will be as continuous and destructive (if continued), in the future, as in the past. The same combination of physical substances, subjected to like processes of fire and heat, will, in the future, generate and emit the same noxious and poisonous vapor; will in like manner taint the atmosphere to the destruction of vegetable life; to the detriment of health; to the hazard of human existence; will render the estate unfit for habitation, and materially depreciate it in its pecuniary value. If this system of brick burning is a nuisance; if its emissions of vapor are noxious and unwholesome, as found by the referee, it should be enjoined and perpetually restrained; and though the granting of an injunction depends, generally, upon a discreet exercise of equity power, I think the learned referee in this case, exercised that power with fair judicial discretion.

Though we may deplore the loss to the defendant of the benefits to be derived from the use of his own property in the manufacture of brick at the locality in question, in this most approved system, so far as profits to him are in question, we think the law, as settled in this State, holds his method of manufacture, in consequence of injury to

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others, to be a nuisance, proper to be enjoined. The burning of brick is doubtless a lawful employment, and so is the carrying on of a slaughter-house, the fattening of hogs in styes, the carrying on the business of a tallow chandler, a smelting house, etc., but all these occupations must be conducted in a manner that or, at localities where, they do not become nuisances, to the material injury of the property of others, and to the health, comfort and enjoyment of their neighbors, in the use and occupation of their own estates.

The judgment in this case does not restrain the defendant from manufacturing brick, nor from the lawful use of his own material of clay and sand for that purpose. It does adjudge that the burning of brick upon the premises described, "by means of mineral coal, whether the same be worked into the brick with the clay and sand by which the brick is constructed, or otherwise used in the burning of brick," be restrained. Having found, as a fact, that the burning of kilns of brick by this process, causes a sulphurous acid gas at certain periods, which is very poisonous to persons who inhale it, and is destructive to many kinds of vegetation, and also the finding that the plaintiffs had sustained material injury therefrom, and that such injuries would continue so long as this process of manufacture was continued, it would seem that perpetual restraint is warranted.

It is claimed by the defendant, that the plaintiffs are precluded from equitable relief in this case, by the purchase of the estate with knowledge that the defendant's grounds had been previously devoted to the business of manufacturing of brick. The referee did find that the defendant's premises had been used as a brick yard for over twenty-five years; and that, at the time plaintiffs improved their property, they knew that the defendant's property *had been previously* applied to such use, and that in such use and manufacture, anthracite coal dust was used and employed. This finding is not quite sufficient to establish the defendant's proposition, even if it was sound law. It is not found when the plaintiffs purchased their estate. The evidence is, that they resided on it first in 1859. They began their improvements in building in 1857, and completed their dwelling-house in 1858. When these improvements were begun, the defendant's grounds, which had previously been used as a brick yard, had been plowed up and were then used for agricultural purposes. The plaintiffs' knowledge of such previous use of the defendant's premises, under the circumstances, was no notice, warning or

admonition that they would be so used in the future, but an implication to the contrary by a present abandonment, and any evidence that the plaintiffs had of injurious effects arising from such former use was insufficient to warn them against a possible future nuisance.

It is also urged that the doctrine of prescription applies to the defendant's right, to use his premises as a brick yard.

There are some *dicta* in the reported cases in England, as well as in the elementary books, suggesting that an individual may acquire a right to pursue an offensive occupation by prescription; by an undisturbed use of such a business for over twenty years.

In the case of *Tipping v. St. Helen's Smelting Co.*, *supra*, this intimation was given by the judge to the jury as follows: "Every man is bound to use his own property in such a manner as not to injure the property of his neighbor, unless, by lapse of time, he has acquired a prescriptive right to do so." But he did not intimate that right by prescription applied to a case of nuisance which visibly diminished the value of the neighbor's property, and destroyed the comfort and enjoyment of it, but clearly intimated the contrary (p. 611). In a *nisi prius* ruling in *Rex v. Cross*, 2 Car. & P. 483, it was said, "If a certain noxious trade is already established in a place remote from habitations \* \* \* and persons come and build houses within the reach of its noxious effects, in those cases the party would be entitled to continue his trade, because his trade was legal before the erection of the house," etc.

This last remark of the judge was entirely *obiter*, and, was it not so, it is in conflict with other English authority.

The English cases, with their conflicts, have been ably reviewed in our own courts. Whatever may be the rule in England or in Pennsylvania on the subject of gaining the right to continue nuisances by prescription, and of the consideration of pecuniary profit to him who continues it, or benefit to trade and commerce, no such rule prevails in this State. Such a doctrine, says DANIELS, J., in *Taylor v. People*, 6 Park. Cr. 353, "would render the property of others subordinate to the purposes of him who might, before they had erected their dwellings, have devoted his own to an offensive and unwholesome business. There is no sound principle of law that will protect any man in thus depriving others of the substantial use and enjoyment of their property." That was an indictment for nuisance in maintaining a slaughter-house, and it was held to be no defense that the slaughter-house when built was remote from habita-



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tions, and that the persons suffering from the stench, afterward built their dwellings within the reach of its noxious effects. So it was said by JEWETT, J., in *People v. Cunningham*, 1 Denio, 536, "No lapse of time will enable a party to prescribe for a nuisance." See *Mills v. Hall*, 9 Wend. 316, and cases cited.

This same rule prevails in Massachusetts. In *Commonwealth v. Upton*, 6 Gray, 473, it was held that carrying on an offensive trade for twenty years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of, and the travelers upon, which it is a nuisance.

But there is another answer to this claim by prescription. In cases where the claim by prescription applies, it must be a continued and uninterrupted possession or use as well as adverse to the rights of others. This is not found as a fact in the case at bar, and the evidence is to the contrary. The brick-yard had been abandoned as such, had been plowed up and the land used for agricultural purposes.

The result of my conclusions upon the foregoing points discussed, and upon a review of the cases in this State, is, that, in an action for nuisance, it is sufficient to show that the premises affected cannot be enjoyed without danger to health, or that their value is substantially impaired by the nuisance; and that such a condition has been proved in this case; that the damages assessed are reasonable and fully sustained by the evidence.

The objections have been presented with great force and ability, but they have failed, I think, to show material error in the finding and legal conclusions of the learned referee.

I think the judgment should be affirmed.

*Judgment affirmed, with costs.*

MILLER, P. J., concurred.

PEOPLE *ex rel.* BARLOW, attorney-general, v. CANAL BOARD (1).

*Canals — surrender of contract to repair — Laws 1870, chap. 55.*

Upon a claim for compensation for permanent improvements by a canal contractor, who had surrendered his contract, under Laws 1870, chap. 55, §§ 4 and 5, there was evidence before the canal board that among other things new piers had been built, and old piers and dams and the tow-path, raised above their original height; feeders built, and new lock-gates put in. The claimant had an award for much less than the alleged permanent repairs had cost. *Held*, upon *certiorari*, affirming the proceedings of the canal board, that the court could not say that the repairs in question were not permanent, nor that the board had adopted an erroneous principle of compensation.

CERTIORARI to bring up the proceedings of the canal board. The facts appear in the opinion.

*Francis C. Barlow*, attorney-general, for relator.

*Francis Kernan*, for respondent.

PARKER, J. This case is brought up by *certiorari* for a review of the award of the canal board to George M. Case, under sections 4 and 5 of chapter 55 of the Laws of 1870.

George M. Case, as assignee of George Collins, held a contract for the repairs of the Cayuga and Seneca canal, which was to run five years from January 1, 1867, at \$20,000 per year. It was surrendered under section 2 of the aforesaid chapter, and said surrender was accepted by the canal board, to take effect April 15, 1870.

Case thereupon, on November 23, 1871, presented a petition to the canal board asking that an award be made to him for "permanent improvements," and such award was made, by a resolution of the canal board, on the 30th day of July, 1873, in the sum of \$9,768.71.

The fifth section of the act provides that every contractor, the surrender of whose contract shall be accepted, shall be entitled to receive the money earned under his contract, and also "for such amount or proportion of work, labor and services under the same, for 'permanent improvements,' as shall, in the judgment of the canal board, be equitable and just, up to the time of surrender thereof."

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People ex rel. Barlow v. Canal Board.

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Upon the abolishment, by the act above referred to, of the system of repairing the canals by contract, and the canceling of existing contracts, it was manifest that cases would be likely to occur in which the contractor would suffer actual loss, not merely of prospective profits (which the act prohibits the payment of), but for moneys expended in the first years of the contract, upon permanent works, which would, upon the giving up of his contract, before the expiration of its term, inure to the benefit of the State, in the matter of repairs, during the residue of the term, and much longer perhaps, in some cases, instead of to the contractor.

Such cases, undoubtedly, the legislature intended to provide for in the said fifth section, and if, in the case at bar, the canal board have made an award based upon facts, showing such expenditures by Case, it cannot be said, I think, that they have either disregarded all rule and principle, or adopted an improper one. From the evidence contained in the return, it may be fairly inferred that Case, before the surrender of his contract, had expended, upon permanent works belonging to the canal, an amount, at least equal to the award, which would inure to the benefit of the State, in the matter of repairs, for the two years remaining of the time for which the contract was made, and in some instances for a much longer time. If three-fifths of his entire expenditures upon such permanent works are justly chargeable to him under his contract, the remaining two-fifths are, with equal justice, chargeable to the State, which otherwise would have the benefit of them without compensation.

Now without going into detail as to the expenditures claimed for, which far exceed the amount awarded, I think enough appears to show that the canal board have acted within their jurisdiction, and the intent of the statute, which provides for the allowance by them to the contractor, for such proportion of the expenditures upon permanent improvements, up to the time of the surrender of his contract, as shall in their judgment be equitable and just, it is impossible to say that the work done by the contractor, in raising the tow-path from Waterloo to Geneva, and at various other points, at an aggregate expense of \$8,365, especially as most, if not all, of it was raised above the original height, was not work upon permanent improvements.

Clearly, the canal board were much better qualified to judge in regard to the fact than the court; and we should not hold their conclusion of fact, in that respect, erroneous.

The same may be said in regard to work done upon building new piers, and raising old ones — raising dams above the original height, building feeders, and putting in new lock gates; also in regard to all the work proved by the report of Soule, the resident engineer, which I understand was new and permanent work, constructed on a new and more expensive plan than the original, and for which he was paid, after deducting the cost of renewing the work on the original plan, which he, as repair contractor, was bound to do.

In respect then to the question under consideration, all the amounts given by the engineer represent the expense of the structures as though renewed by the contractor upon the original plan, pursuant to his contract, and they are all permanent improvements, or at least I do not see why the canal board may not have properly considered them so, which will outlast the contract, and of which the State would receive the benefit for the two remaining years of the contract without charge, except what the contractor may be allowed under said fifth section of the act.

All these contributing to the permanent work on the canals would equitably entitle the contractor to an allowance under the act fully equal to the amount of the award in question, and I am able to discover no ground upon which we can say the defendants erred to the prejudice of the State in the proceedings and determinations which we are called upon to review.

I am of the opinion that the proceedings and award should be affirmed.

*Proceedings affirmed.*

MILLER, P. J., and P. POTTER, J., concurred.

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Hudson v. Caryl.

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## HUDSON V. CARYL.

*Evidence — damages, how proved.*

In an action to recover damages for injuries to a farm, the judge at the trial permitted a witness to answer the question, "What was the damage — the annual damage — in the rent of the farm, in your judgment?" *Held*, error.

THIS action was brought by plaintiff to recover of defendant damages occasioned by a dam across the Schenevus creek, which runs through the lands of plaintiff and defendant, and thereby caused the water of said creek to set back upon and overflow a portion of plaintiff's land.

The action was commenced in April, 1863.

The answer was a general denial, and a former suit in bar of the action. A trial was had at the Otsego circuit court, third Monday of September, 1872, before Hon. WM. MURRAY, justice of this court, and a jury; and the questions raised and the rulings to which exceptions were taken by the defendant relate to the admission of evidence upon the trial.

A verdict was rendered for plaintiff, and all proceedings thereon stayed till a case and exceptions were made and settled, which were ordered to be heard in the first instance at the general term.

*E. E. Ferrey*, for plaintiff.

*H. Sturges*, for defendant.

MILLER, P. J. Upon the trial of this action the plaintiff asked one of the witnesses what the annual damages to the farm were, occasioned by the flowing back of the water. The question was objected to, and the court said the plaintiff could show how much the farm was depreciated by reason of the back water, to which ruling the defendant's counsel excepted. The following question was then put: "You can answer the question what was the damage — the annual damage — in the rent of the farm, in your judgment?" The question was again objected to, the objection overruled, and the defendant excepted. The witness answered: From what I know of the premises, I should make it fifty dollars a year.

It is quite evident that the judge erred upon the trial in allowing proof of damages in the form stated.

It is settled, by repeated judicial decisions in this State, that damages cannot be proved by the opinions of witnesses alone, and the functions of the jury thus taken from them. It is for the witnesses to state the facts, and for the jury to draw their conclusions from the facts presented.

The question in the case at bar was, what amount of injury was caused, by reason of the overflowing of the water, and what was the depreciation in value of the farm in consequence thereof. While it would have been entirely competent for the witness to give his opinion as to the annual value of the farm as it was before, and its value after the injury, yet the authorities hold that the witness cannot make the subtraction himself and declare the result.

This is a matter for the jury and not for the witness. In *Van Deusen v. Young*, 29 N. Y. 9, the question was put to the witness: What was, in his opinion, the difference in the value of the farm by the removal of timber? And it was held to be incompetent

The court say that "it was the province of the jury to ascertain the amount; it was the province of the witnesses to furnish the data from which the amount was to be ascertained. When, therefore, the witness was called on to give his opinion as to how much the farm was depreciated in value, he was required to give his opinion as to the amount of damages the plaintiff had sustained."

The case is directly in point, although the question put in the case cited was less objectionable than the one at bar, as in the latter the witness was asked directly, what was the annual damage in the rent? See, also, *Armstrong v. Smith*, 44 Barb. 120, and cases cited.

Several other questions are raised on the argument, but as a new trial must be granted for the error already discussed, it is needless to pass upon them.

*New trial granted, with costs to abide the event.*

FITCH V. AMERICAN POPULAR LIFE INSURANCE COMPANY,  
appellant.

*Life insurance — conditions in policy — erroneous statements in application when they avoid policy.*

A life insurance policy contained a provision that fraud or intentional misrepresentation should vitiate it, and that the statements in the application were warranties and in all respects true, and that no fact relative to the insured affecting the interest of the company which, whether material or not, would tend to influence the company to take the risk, was suppressed or omitted. The application upon which the policy was given contained a provision that the answers to the questions therein, and the statements made to the examining physician and signed by him, and the insured were warranties correct and true, and that there was not concealed or unmentioned therein any circumstance in relation to the past or present state of the health, habits of life, condition or intention of the insured, or any other fact concerning him, his relatives or ancestry with which the company should be made acquainted; and that if the statements, etc., were not true and correct the policy should be void.

Certain of the statements in the application were incorrect. It was stated that the insured never had any illness or local disease, while he had had some years previously a slight disease of the eyes; that a physician had never attended him, when three years before a physician had attended him; that his vocation was, and had been, a traveling agent, when, in fact, he was at one time a painter, and had been in the army; that he had lived in New York, and he did not state the fact that he had been in Virginia. *Held*, that the statements were warranties, and being untrue, whether as to material matters or not, the policy was avoided.

ARPEAL by the defendant from a judgment for the plaintiff entered upon a verdict, and from an order denying a new trial.

The action was brought to recover upon a policy of insurance for \$3,000, dated November 22, 1870, upon the life of one Oliver C. Fitch, who died December 17, 1870, and was tried at the Columbia circuit, January 20, 1873, before Mr. Justice INGALLS and a jury, and resulted in a verdict of \$3,313.89 for the plaintiff.

The policy contained the following condition: "Fraud or intentional misrepresentation vitiates the policy, and the statements and declarations made in the written application for this policy, and on the faith of which it is issued, are warranties, and in all respects true, and do not suppress or omit any fact relative to the insured affecting the interest of the company, or which, whether material or not, would tend to influence the company in taking the risk."

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Fitch v. American Popular Life Insurance Co.

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The application contained the following statement: "I, the undersigned applicant, do hereby declare, that the preceding written answers to the annexed questions and the written statements in the preceding statement, declaration or warranty, together with the statements made to the examining physician, and signed by him and the next above person (the insured), and presented to the company, are warranties correct and true; and that there is not concealed, withheld, nor unmentioned therein, one circumstance in relation to the past nor present state of the health, habits of life, condition, nor intention of the next above-named person, nor any other fact concerning the said person, nor the relatives nor ancestry of the said person with which the directors of said company ought to be made acquainted. \* \* \* And it is hereby further agreed, that the preceding written answers given to the annexed questions, and the statements made in the preceding statement, declaration, or warranty, shall be the basis and form part of the contract or policy between the undersigned applicant and the said company; and if not in all respects true and correct, the policy shall be void."

The remaining facts will appear in the opinion.

*George Bliss*, for appellant.

*R. E. Andrews*, for respondent.

PARKER, J. This action is brought by the plaintiff on a policy of insurance issued by the defendants, by which the life of her husband, Oliver C. Fitch, was insured for the sum of \$3,000.

The defendants, by their answer, and at the trial, denied their liability, on the ground that there was a breach of warranty, misrepresentation and concealment, which, by the terms of the policy, rendered the contract void; and also on the ground that the insured committed suicide.

At the trial, the evidence bearing upon the last defense was excluded, because the policy contained no clause upon that subject. The jury found a verdict for the plaintiff for the amount insured by the policy, with interest. The plaintiff moved upon the minutes for a new trial, which was denied. Judgment was entered upon the verdict from which, and from the order denying a new trial, the defendants appealed. It appears by the written application for the insurance, that the insured was asked, by written interrogations,



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whether he ever had any illness, local disease, or any injury in any organ? to each of which inquiries he answered "*no*."

He was in the same way required to name his family physician, and each one who had ever given him medical attendance, and if neither existed, some medical man and acquaintance who knew him well, to which his answer was, "have none." He was also asked to state his vocation, what it then was and what it had been, and his answer was "traveling agent."

He was in like manner inquired of as to his birth place, and answered "Tolland, Connecticut." He was then asked where he had lived since, and how long in each place, his answer was in "New York."

It was shown on the trial, without any contradiction, that he had, about six years before, a disease of his eyes known as conjunctivites, which required and received the care and skill of a physician for about a month, at Kinderhook, N. Y., his then residence. The attendance of the physician, Dr. Benson, was from 7th of November to the 1st of December, 1864. It was also found that, in September, 1864, he was in the army in Virginia, and was then attacked with some disease or received some injury to his eyes, so that he was confined to his tent, and subsequently was sent into hospital. This commenced as early as September 25th, and he was in hospital as late as October 24th. When he was attended by Dr. Benson, he was home on furlough, and was soon after transferred to the hospital in Albany, where he remained until the spring of 1865. Subsequent to the above attendance upon him, of Dr. Benson, and in 1867, the same physician was again once called to visit him professionally. It was proved by the testimony of the plaintiff, his widow, that the insured was, by trade, a painter; that, after his marriage in 1860, he worked at his trade till he went into the army in 1864; and, after his discharge from the army, in 1865, he again worked at the same trade, more or less, making it his business as late as during the summer of 1867. The fact that he had been in the army during the fall of 1864, was also proved and not disputed.

It is claimed, on the part of the defendant, that these discrepancies between the statement in the written application and the facts proved, invalidated the policy, and that plaintiff was, therefore, not entitled to recover upon it.

There can be no doubt that the statements made in the application and under this policy are warranties, for it is declared in the policy

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that "the statements and declarations made in the written application for this policy, and on the faith of which it is issued, are *warranties*, and in all respects true; and subjoined to all the questions and answers in the application is the following: "I, the undersigned applicant, do hereby declare that the preceeding written answers to the annexed questions, and the written statements in the preceding statement, declaration and warranty, together with the statement made to the examining physician, and signed by him, and the next above person [insured], and presented to the company, are *warranties*, correct and true; and that there is not concealed, withheld nor unmentioned therein, any circumstance in relation to the past or present state of the health, habits of life, condition nor intention of the next above-named person \* \* \* with which the directors of said company ought to be made acquainted. And it is further *agreed* that the preceding written answers, given to the annexed questions, shall be the basis and form *part of the contract or policy* between the undersigned applicant and the said company, and, if not in all respects true and correct, the policy shall be void."

If it is possible to render the written answers to the questions in the paper called, generally, the application, which, when filled up, contains what is called the statement, declaration and warranty, warranties, it is done here. See *Kelsey v. Universal Life Ins. Co.*, 35 Conn. 225; *Jennings v. Chenango M. Ins. Co.*, 2 Denio, 75; *Miles v. Conn. M. Ins. Co.*, 3 Gray, 580; *Miller v. Mutual Benefit Life Ins. Co.* (Supreme Court of Iowa, 1871) 2 Bigelow Life and Accident Ins. Rep. 693.

If, then, the answers above specified are shown to be false, untrue, in fact, from what cause soever it happened, whether from intention, forgetfulness or mistake, no matter from what cause, the policy is void.

I think each one of the answers to the interrogatories above specified, is shown to be untrue. The proof that he had disease of or injury to his eyes, continuing for the space of at least two months, so severe as to disable him from duty while in the army, and to require medical treatment while on his furlough, is undisputed. His answer in the negative, then to the inquiry, whether he had ever had local disease or injury to any organ, was false. So his answer to the effect that no physician had ever given him medical attendance was also false.

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His answers, too, in respect to his vocation and where he had lived since his birth, contained covert falsehoods—which, if not intended to deceive, were likely to do so. The inquiry as to his *vocation* was what it then was and what it had been. His answer, *traveling agent*, was true as to what it then was, but untrue as to what it had been, for the inquiry as to his past vocation obviously called for the statement that it had been a *painter* and a *soldier*, as well as a traveling agent. The answer was false from the clear and manifest failure to tell the whole truth.

The same is true of his answer to the inquiry where he had lived since his birth in Tolland. His answer, “New York,” was not the whole truth, he had lived in Virginia also.

It being agreed between the parties to the policy that the “written answers to the annexed questions shall be the *basis* and form part of the contract or policy between them, and, if not in all respects true and correct, the policy shall be void,” it follows that the falsity of the answers in the particulars above stated renders the policy void.

The learned counsel for the plaintiff insists that the answers above referred to were in respect to immaterial matters and therefore should not be deemed warranties within the true intent or meaning of the contract, and also that the whole is qualified by the declaration in the application that the policies of this company are made in entire unconditional, honest, good faith, and that it is expected that the application be made in good faith, and the assurance can be jeopardized only by dishonesty or inexcusable carelessness on the part of the applicant. I do not think the actual warranties agreed upon in the contract are prevented from taking effect by this preliminary disquisition in the beginning of the application upon the importance of honesty and carefulness on the part of the applicant. After all this comes the agreement that the answers to the annexed questions are warranties; that they form part of the contract or policy, and if not in all respects true, the policy shall be void, and after such caution and the accompanying explanation that if the insured cannot answer “yes” or “no” he can properly say, “I do not know.” It is inexcusable carelessness, at least, to say “yes” or “no” untruly.

Nor will it do to say that the immateriality of the answers prevents their being warranties. Such construction would do away the distinction between representations and warranties. In *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. 416. SHAW,

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Ch. J., said, "the difference [between a warranty and a representation] is most essential. If any statement of fact, however unimportant it may have been, regarded by both parties to the contract is a warranty, and it happens to be untrue, it avoids the policy. If it be construed as a representation and is untrue, it does not avoid the contract if not willful, or if not material. To illustrate this, the application in answer to interrogatory is this: 'Ashes are taken up and removed in *iron* hods,' whereas it should turn out in evidence that ashes were taken up and removed in *copper* hods, perhaps a set recently purchased and unknown to the owner. If this was a warranty the policy is gone, but if a representation it would not, we presume, affect the policy, because not willful or designed to deceive, but more especially because it would be utterly immaterial, and would not have influenced the mind of either party in making the contract or in fixing its terms."

The question of warranty then does not depend upon that of materiality, as seen by Judge SHAW's illustration; a very immaterial thing may be the subject of a warranty, and if a warranty a breach of it will avoid the policy.

"It is a matter of no moment then, whether the warranty is material, or not as regards the risk; it must be complied with before the assured can maintain an action against the underwriters." *Jennings v. Chenango M. Ins. Co.* 2 Denio, 75, 81. See also *Anderson v. Fitzgerald*, 4 H. of L. Cases, 484. In this case the question was after mature examination and deliberation decided in the house of lords overruling the courts of exchequer and exchequer chambers in Ireland, in regard to statements made in the proposal for insurance that "some of the relatives of the insured had died of consumption or any other pulmonary complaint, and that his life had not been accepted or refused at any other assurance office." That they were warranties, and that being warranties it was of no consequence whether they were material to the risk or not; if they were untrue the policy was thereby rendered invalid, and no recovery could be had upon it. In the course of his opinion in that case the lord chancellor said "nothing can be more reasonable than that the parties entering into a contract of life insurance should determine for themselves what they think to be material, and if they choose to do so, to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, and his false

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answer will then avoid the policy." And see *Miles v. Conn. M. Ins. Co.*, *supra*. Upon this view of the case the defendants were entitled to the nonsuit asked for at the close of the evidence.

The same view leads to the conclusion that the court erred in refusing to charge as requested by defendant's counsel, "that if they [the jury] believe that Fitch had had any disease of his eyes, such as to require care or attention, no recovery can be had."

The view above taken renders it unnecessary for us to examine the other questions raised in the case.

The judgment must be reversed and a new trial granted, with costs to abide event.

*Judgment reversed and new trial granted.*

MILLER, P. J., and P. POTTER, J., concurred.

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AUSTIN, appellant, v. HOLLAND.

*Evidence — dissolution of partnership, notice of.*

The mailing of a notice of the dissolution of a partnership, properly directed to a dealer with the firm, is only *prima facie* evidence that the notice was received, and may be rebutted by proof that the person to whom it was directed was not at the place to which it was sent, and that he did not in fact receive it.

ACTION on a promissory note made by Dillon Beebe & Co., August, 1869, payable to the order of Horace Loveland, and by him transferred to plaintiff, after maturity. The defendant, Holland, was a member of the firm of Dillon Beebe & Co., lumber merchants, Holland residing at Buffalo and Beebe at Toledo. On the 9th of March, 1868, Loveland was employed by the firm as agent. On the 29th day of March, 1869, the partnership was dissolved. A circular letter, containing a notice of the dissolution, was duly deposited in the post-office, directed to said Loveland at Toledo, and another directed to him at Detroit. After the dissolution said Loveland, by direction of Beebe, continued to purchase lumber in the name of Dillon Beebe & Co., until August, 1869, when he settled with Beebe and received the note in suit as part of his compensation for services.

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The defendant, Holland, set up as a defense to the action that the said Beebe had, at the time of making the note, no right or authority to bind him by or under the name of Dillon Beebe & Co.

At the trial plaintiff offered to show that Loveland was not in either Toledo or Detroit when the notices of dissolution were mailed, nor for some time thereafter; and that he never received either of these notices, nor knew of the existence of such notices until after the note fell due. The evidence was excluded, and plaintiff excepted. A motion for a nonsuit was granted, and plaintiff appealed.

*M. I. Townsend*, for appellant.

*Esek Cowen*, for respondent.

PER CURIAM. We think that Loveland was a dealer with the firm, and that the court erred in excluding the proof offered that Loveland was not in either Toledo or Detroit at the time when the notices were mailed. While the mailing of a notice properly directed may be *prima facie* presumptive evidence that it was received, yet it is not so entirely conclusive that the presumption may not be rebutted by proof that it was not received. When the person was absent from his residence for a considerable period of time, and not likely to receive the notice, or when engaged in the employment of the firm and absent on their business, the presumption is not as strong as it might be under other circumstances. Whether the notice was received by the plaintiff or not depended upon all the facts connected with the transaction, and it was competent, as a part of the surrounding circumstances, to show where the plaintiff was, and that he did not actually receive the notice.

Judgment and order reversed and new trial granted, with costs to abide the event.

*Judgment reversed.*

JENKS V. ROBERTSON, administratrix, etc., appellant.

*Release of contract under seal — waiver of condition — estoppel — interest.*

A contract, under seal, may be released or modified by a parol agreement which is carried into effect.

J. S. contracted, under seal, to perform certain work for defendant. Defendant afterward, by parol, and for a valuable consideration, agreed to release J. S. from a performance of a part of the work. The part of the work so released, defendant let to other parties, and J. S. performed the remainder. *Held*, that the release was valid.

J. S. having a contract to perform certain work for defendant, which provided, among other things, that the contract should not be assigned without the written consent of defendant, assigned said contract without such written consent to plaintiff. Plaintiff performed the work and the defendant knowing of the assignment, delivered to him estimates, paid him upon his own receipt, and otherwise treated him as assignee without making objection to the assignment. *Held*, that defendant was estopped from claiming that the assignment was invalid.

Where, by contract for the performance of work, a certain per cent is to be deducted from the monthly payments and retained until the entire performance of the contract, the amount is due on the completion of the work, and bears interest from that time.

APPEAL from a judgment, in favor of the plaintiff, upon a verdict rendered at the circuit. The opinion states the facts.

*Matthew Hale*, for appellant.

*George Sydney Camp*, for respondent.

MILLER, P. J. The action was brought by the plaintiff as assignee of one John Passmore of a contract under seal, made between him and one Robertson the defendant's intestate, on the 25th of October, 1867, for the construction of a portion of the Southern Central Railroad. By the contract the defendant's intestate had a right to retain from the monthly payments ten per cent of the whole amount of work done and materials delivered, the amount so deducted to be paid to Passmore on the full and entire performance, by him, of the contract on his part, and by a failure to perform the covenants of the contract, Passmore was to forfeit any balance of the money due as well as the ten per cent retained. It was also agreed that Passmore should not sell, assign or transfer the contract or any interest therein, or sub-

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let any part of the work without the written consent of Robertson. The action was tried before Mr. Justice MURRAY and a jury, at the Tioga circuit, in March, 1872. It appeared upon the trial that one Worthington was a partner of Robertson for the construction of the portion of the road included in Passmore's contract, and Passmore having done some work and put up a boarding shanty in January or February, 1868, made a proposition to Worthington to release him from that portion of the job, known as sections eleven to thirteen, lying north of the Owego creek, and offered to give the shanty upon being so released. No answer was then given, but in March, 1868, the proposition was renewed, when Robertson, Worthington, and one Evershed, who was their general agent, were together, and there was proof to show that it was then agreed to release Passmore from the portion of the contract above mentioned. The testimony on this subject was conflicting, and the case was submitted to the jury, upon this as well as other questions of fact which arose upon the trial under the charge of the justice presiding at the circuit. Immediately after this alleged arrangement, a written contract was entered into between Robertson and Worthington with one McRae, to whom, also, the shanty was sold or given up by them for the portion of the job claimed to have been released, and the estimates for the remainder were made out, and the work done by Passmore, and money paid to and receipted by Passmore, or in his name. On the 4th of May, 1868, Passmore having performed a large amount of work, about all of which was on that portion of the job south of the Owego creek, and having been paid for the same, except the ten per cent reserved, assigned the contract, including the ten per cent, to the plaintiff. This assignment was brought to the knowledge of Robertson and Worthington, and on the 24th day of June, a copy of the same was furnished to them, upon their application. Although the estimates were made out in the name of Passmore, yet from the time of the assignment, the money for the work done was paid to and receipted by the plaintiff individually, and for Passmore. No objection was made to the assignment by the defendant or Worthington, as the defendant testifies. After the action was commenced Robertson died, and it was continued against his administratrix. The jury found in favor of the plaintiff for \$4,932.87, including interest on the ten per cent from the completion of the job. Various objections were made and exceptions taken, which are hereinafter considered and discussed.



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The contract between the defendant's intestate and Passmore being under seal, the question arises whether the alleged release or modification was valid and effectual. There is a class of cases which hold that an executory contract, under seal, cannot be discharged by a parol executory agreement. See *Delacroix v. Bukley*, 13 Wend. 71; *Eddy v. Graves*, 23 id. 82; *Lawrence v. Woods*, 4 Bosw. 354, 362.

The principle laid down in these cases is not, I think, applicable to cases where the agreement, by virtue of which the release was made, was carried into effect, and it is well understood to be the law, that a covenant under seal may be released, in whole or in part, by a parol executed agreement. *Lattimore v. Harsen*, 14 Johns. 330; *Dearborn v. Cross*, 7 Cow. 48; *Allen v. Jaquish*, 21 Wend. 632; *City of Brooklyn v. Brooklyn City R. R. Co.*, 57 Barb. 499. In *Allen v. Jaquish*, *supra*, it is said in the opinion that, when the agreement under seal is departed from in the mode and time of its performance, and yet the performance is accepted as satisfactory, though an action of covenant will not lie, the acts of the parties shall be considered as evincing an executed agreement to rescind the contract. The person sought to be charged having acceded to the departure and equity, conscience and good faith, therefore, demanding that he should make compensation, the law raises an implied promise to pay.

The parol agreement in the present case was executed by the delivery of the shanty as the consideration, by the surrender of that portion of the contract to another party with the defendant's approval, and by the work done afterward by the plaintiff on the faith of the arrangement, which was fully recognized and sanctioned, and by the payment of money therefor by the defendant.

It may also be remarked that the non-performance of the portion of the contract which was surrendered was occasioned entirely by the act of the defendant and his partner, and, therefore, the defendant is not in a position to avail himself of the failure he has occasioned, as he himself has prevented the act being done. *Fleming v. Gilbert*, 3 Johns. 528; *Betts v. Persine*, 14 Wend. 219; *Young v. Hunter*, 6 N. Y. 207. Within these cases, the non-performance having been caused by the party himself, he has waived the condition precedent, and is estopped from interposing the same as a defense. A party may by acts recognize a contract which has thus been changed, and by acting under it as agreed upon, waive its performance. *City of*

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*Brooklyn v. Brooklyn City R. R. Co.*, 57 Barb. 499. *Goit v. National Protection Ins. Co.*, 25 Barb. 192; *Carroll v. Charter Oak Ins. Co.*, 10 Abb. N. S. 166. It would be in direct violation of settled rules of law to hold that where a party had voluntarily consented to the relinquishment of part of a contract, and allowed another to proceed on this basis, recognizing such change and consenting to the performance of labor and the expenditure of money, that no recovery could be had on the remainder of the contract. The doctrine of estoppel is clearly applicable to any such claim or defense to the enforcement of the contract which had been acted upon.

It is said that the release was without consideration. The answer to this position is that the shanty delivered was a sufficient consideration, and was sold or given by the defendant and Worthington to the new contractor, who took that portion of the contract which was relinquished. Even if such was not the case, the acceptance of the consideration above stated, in connection with the subsequent acts of both parties in recognizing the validity of the contract as modified, and the performance of the same by the assignee, and the acceptance of the work and the payment of money by the defendant's intestate, on account of the same, were sufficient to uphold the release within the rules laid down in the authorities cited.

Although the evidence was conflicting upon the question whether there was a release by parol, yet there was sufficient proof, I think, to sustain a verdict of the jury to whom the question was properly submitted, and who found in favor of the plaintiff. Certainly, there is no such preponderance of evidence as would justify a reversal of the judgment on that account. But as no motion was made for a new trial, on the facts, I do not see how this question can arise upon the bill of exceptions argued on this appeal.

The provision in the written contract that Passmore should not sell or transfer any portion of the contract, without the consent, in writing, of the defendant's intestate, was, I think, waived by the acts of the parties within the decisions cited on the subject of waiver.

The defendant's intestate, being notified that the contract had been assigned to the plaintiff; that he was performing it as such assignee; and having acquiesced in such performance, delivered the plaintiff monthly estimates, paid him upon his own receipts at times, and treated the plaintiff as such assignee, without making any

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objection to the assignment, was estopped from claiming, after the work was done, that the assignment should have a consent in writing, to make it valid and effectual. I think that the judge properly refused to charge the jury that the plaintiff was only entitled to recover for such work as was done by the plaintiff, and not for *any work* done by Passmore. The request was too broad, and would exclude a recovery for the ten per cent which was reserved and expressly assigned to Passmore.

I also think that there was no error in the allowance of interest. By the terms of the contract, the ten per cent deducted and retained out of the monthly payments was to be paid and was due on the full and entire performance of the contract. The work was completed on the 14th of September, and upon the completion of the work, this amount became due. The contract does not provide for a final estimate or for payment, according to such estimate, and, therefore, there appears to be no good reason why interest should not be allowed from the completion of the contract and when the amount became due, according to the established rule in such cases.

I discover no error in any of the rulings upon the trial, and I am of the opinion that the judgment should be affirmed, with costs.

*Judgment affirmed.*

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MILLER V. CHURCH, *et al.*

*Nuisance — overflow from mill-dam — notice to owner.*

In an action for damages for the overflow of a mill-pond it was shown that defendant, the owner of the pond, was not in possession, having leased the same to a third party. *Held*, that the owner of the premises overflowed could not recover for such overflow, without showing that defendant had notice or knowledge of the existence of the same before the action was brought.

EXCEPTIONS ordered to be first heard at General Term. The facts are stated in the opinion.

*E. A. Kingsley*, for plaintiff.

*R. A. Stanton*, for defendant.

MILLER, P. J. The action was brought to recover damages for injuries to the plaintiff's premises, by reason of the water of an adjoining mill-pond overflowing said premises, and a verdict rendered in favor of the plaintiff. At the close of the plaintiff's testimony, upon the trial, the defendant's counsel moved for a nonsuit, upon the ground, among others, that no notice had been shown to have been given to the defendant Church of the condition of the premises previous to the bringing of the action, nor proof given that Church knew of their condition, which motion was denied and an exception taken. The motion was renewed at the close of the entire testimony and denied, and an exception taken to the ruling.

The counsel for the defendant Church, on the argument, presses upon our attention the point above raised alone, thereby waiving all other questions. After examination, we are satisfied that the ground stated was well taken, and the court erred in refusing the motion for a nonsuit, within the principle decided in the case of *Conhocton Stone Co. v. Buffalo, N. Y. & Erie Railroad Co.*, 51 N. Y. 573.

It was held in the case cited that, in order to maintain an action for damages resulting from a nuisance upon the defendant's land, where such nuisance was erected by a previous owner, before conveyance to defendant, it is necessary to show that before the commencement of the action he had notice or knowledge of the existence of the nuisance. The action in the case cited was brought for injuries to the plaintiff's wall-bed caused by the same being washed and flooded, and the defendant was a purchaser at a foreclosure sale of the railroad and franchises which the railroad company had leased to the Erie railway company. A motion was made for a nonsuit, for a want of notice, and denied, and the judgment reversed upon that ground. The court, citing from Angell on Water Courses, 570, lay down the proposition before stated, and say that the notice "may be either oral or written, or it may be by acts done, clearly informing the party to be affected by it of the existence of the nuisance, and of the desire of the party injured to have it removed, so that the person to whom it is addressed shall fully understand the ground of complaint, and that the party giving it is unwilling to have it continue."

The defendant Church was a grantee, not in possession of the premises, having leased the same to a third party, and stands precisely in the same position as the defendant in the case cited. No

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satisfactory answer is made to the application of the principle decided in the case at bar.

The evidence does not show any notice to or knowledge of the defendant Church, who answers separately, and who only appears upon the argument of the case, and notice to Gurnsey, the other defendant, who was not a joint owner with Church, and whose ownership was entirely separate and distinct, and of a different character from the ownership of Church, was not enough to enable the plaintiff to maintain an action against the latter. For the error stated a new trial must be granted, with costs, to abide the event.

*New trial granted.*

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BOWMAN V. AGRICULTURAL INSURANCE COMPANY, appellant.

*Fire insurance—parol evidence as to subject of—waiver of conditions.*

In a policy of insurance upon personal property, situated in farm buildings, and in the application therefor, the expressions employed were inaccurate and uncertain, to such a degree as to render it doubtful which buildings were meant. *Held*, in an action upon such policy, for loss, that it was competent to explain the ambiguity in the policy and application by extrinsic evidence.

An insurance policy contained a provision that the premium was due and payable upon the delivery of the policy, but where credit was given the premiums should be paid within four months from the date of the policy, and, if not paid within that time, the company should not be liable for any loss that might occur. It also contained a provision that no agent of the company was permitted to waive any stipulation or condition contained therein. *Held*, that the provision as to payment might be waived by the company, or its authorized agent, and this waiver might be by parol.

Plaintiff had insured with defendant, an insurance company, certain property, by a policy containing the above named provisions. The arrangements were made with an agent; the policy was sent by the company directly to plaintiff, without requiring prepayment, and without any limitation of credit being suggested. *Held*, that it was for the jury to determine whether the provisions of the policy were waived.

APPEAL, from judgment on verdict. The cause was tried before Justice Bockes, and a jury, at the Schenectady circuit, in March, 1873.

The action is upon two policies of insurance, executed by the

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defendant to the plaintiff, one insuring certain property of the plaintiff, to wit: Household furniture, provisions, wearing apparel, live stock, farming utensils, wagons and harness, for the three years, from May 20, 1871; the other, certain other property of the plaintiff, to wit: \$1,000 on produce, for a like term, from the 30th day of September, 1871, and is to recover for loss by fire and lightning, of wagon and farming utensils, under the first policy, and for produce, under the second. The total loss, as shown by proofs of loss, was \$851.50. The loss under the first policy was \$75.50. The loss under the second policy, on produce, was \$776. The plaintiff resides at Clifton Park, Saratoga county, N. Y., where the loss occurred. Two grounds of defense are set up in the answer:

1st. That the loss did not happen in the place where the property was insured.

2d. That the second policy was forfeited, previous to the loss, by reason of the non-payment of the premium within four months from the date of the policy. The application or survey upon which the first policy was issued, dated May 20, 1871, No. 187,803, designated the place where the property was insured.

The application or survey upon which the second policy was issued, dated September 30, 1871, refers to the survey or previous application as describing the place where the property insured was situated. The policies contain, among other things, the following provisions: "The premium is due and payable upon the delivery of the policy; but where credit is given to the extent of four months, this policy will be valid and in force during that time; but, unless the note or account for the premium shall be paid within four months from the date of this policy, the company will not be liable for any loss that may occur after the expiration of said four months. If no loss has occurred, payment of the premium after said four months will render this policy valid;" also a provision that no agent of the company is permitted "to waive any stipulation or condition contained therein."

The evidence was conflicting as to which barn was intended, and the material facts, as well as the questions raised, are stated in the opinion. The jury found in favor of the plaintiff for the amount claimed, and interest, being \$868.81. Judgment was entered, and the defendant appealed from the judgment.

*Samuel Hand*, for appellant.

*J. S. Landon*, for respondent.

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MILLER, P. J. The motion for a nonsuit, made by the defendant's counsel, was founded upon two grounds:

1st. That there was no contract between the parties, for any insurance, upon any of the property destroyed in the place where the loss occurred.

2d. That the policy of September 30, 1871, by the non-payment of the premium, according to the condition of the same, became forfeited prior to the alleged loss.

I. As to the first ground: If the testimony tending to prove that the agent was informed which barn was the hay and grain barn of the plaintiff, and intended to be embraced in the policy, was competent, then it cannot be upheld. I am inclined to think that the testimony was properly received. It appears that the policy of May 20, 1871, includes the "barns" on the premises, and, although in the application the distances of each of the barns from the house are not stated, and, perhaps, the size of one is not accurately given, yet, upon the whole, it is quite apparent that the policy actually did cover the contents of both barns, which were intended to be insured, beyond any question.

As to the policy of September 30, 1871, there is more difficulty. The policy specifies between the printed words "barn No. 1" and "barn No. 2," produce, etc., "in barns now occupied by applicant." The application upon which this policy was based after the printed words "barn No. 1," and between these and the words "barn No. 2" has the following words, "produce therein, hay and grain, \$1,000, insured at present residence."

It has also, under the words, "size of barns" as follows: "Survey No. policy 187,803," which is the number of the first policy. Also, "distance of barns from house, etc., north barn from house ten rods."

In the application or survey which is referred to as above, are the following words, "size of barns, 30x40; shed, 18x60. The distance of "barns from house, etc.," is also stated as follows, "west barn from house twelve rods." The two barns were forty rods apart, one of them being south-west of one of the dwelling-houses, and the other barn about ten rods south of the other dwelling-house. In the last mentioned survey the dimensions are also given of the dwelling-house in which the plaintiff lived, and not of the other one. The policy specifies "barns," although this description is after "barn No. 1." The application for the last insurance refers to the size of "barns" and distance of "barns," and it must be admit-

ted that there is great want of accuracy and precision in the expressions employed, and that the latter policy and application contains uncertain, ambiguous and inconsistent statements. As there were two barns and two dwelling-houses, it is not entirely clear that the barn, which contained the property destroyed, was not included. There is certainly sufficient to create considerable doubt upon the subject, and I am inclined to think that the facts and circumstances presented a case of latent ambiguity, which was open to proof by extrinsic evidence.

The courts have gone very far in allowing evidence to explain doubtful language. In *Burr v. Broadway Ins. Co.*, 16 N. Y. 267, where the policy described the building occupied as a cordage factory on the "No." west corner "by which the owners were insured on their lignum vitæ contained in a cellar of said building," it was held that, assuming that the abbreviation "No." and a reference in the policy to a survey, etc., applied the description to the north-west corner, it was competent for the insured to prove, for the purpose of showing that a building on the south-west corner was intended, that they were the owners of buildings on both corners, etc., but differing in that the building on the south-west corner was occupied as a cordage factory, and had a cellar under it in which a large quantity of lignum vitæ was kept in store, while that on the north-west corner was occupied as a block factory, and had no basement, but a cellar containing a small quantity of lignum vitæ. If the evidence introduced was competent in the case last cited, I am at a loss to see why it is not equally proper to show what barn was intended, where more than one is named. See, also, as bearing upon the same question, *Reynolds v. Commerce Fire Ins. Co.*, 47 N. Y. 597, which holds that, when equivocal language is used, especially such as is calculated to mislead, it is to be construed most strongly against the company using it. Also, *Clinton v. Hope Ins. Co.*, 45 N. Y. 454. The case of *Pindar v. Resolute Ins. Co.*, 47 N. Y. 114, is not in any respect in conflict with those above cited, as there was no question of doubtful interpretation or of ambiguity to be explained.

II. The second ground for a nonsuit was also, I think, properly overruled. The authorities hold, beyond any question, that a condition in a policy of insurance that no insurance shall be considered as binding until the actual payment of the premium may be waived by parol by the company, or its authorized agent, and this waiver



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may be shown by direct proof that credit was given, or may be inferred from circumstances. See *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117, and authorities there cited.

The provision in the case at bar was no more strict than in the cases cited, and if the evidence established a waiver it would not defeat the plaintiff's claim to recover. The cases to which we have been referred, as holding a different doctrine, cannot, I think, be considered as establishing any other rule. *Baker v. Union Mut. Life Ins. Co.*, 43 N. Y. 283, merely hold that an unsuccessful demand of payment could not be construed into an abandonment and waiver of any of the terms or conditions of the note or policy, or as an alteration of the contract, in any particular. The case of *Hall v. Home Ins. Co.*, 8 Bosw. 597, turned upon the question whether there was proof to show that the agent had authority to vary contracts made by the defendants, or to waive any condition of the same. If it can be considered as sustaining a doctrine adverse to the rule laid down in 51 N. Y., *supra*, it is not sound law. In *Stringham v. St. Nicholas Ins. Co.*, 37 How. 365, the question was, whether the agent had power to consent to assignments of policies where the proof showed that his powers were restricted, and were not of so general a character as to give him authority to do the act in question.

Provisions of this character are to be construed strictly against the insurer, and as the provision under consideration contemplated a credit and only provided for a forfeiture "where credit is given to the extent of four months," can it be said to be applicable when a longer or an indefinite credit was extended? According to this condition "the premium is due and payable upon the delivery of the policy." The arrangements for the policy were made with the agent; the application indorsed, as approved by one of the directors, and the policies received by plaintiff, from the post-office. They thus came directly from the office of the company, and were sent without requiring pre-payment, and without any limitation of credit being suggested. The case is far stronger than 56 N. Y. 260, *supra*. And there is evidence from which it might well be inferred that not only the agent extended the credit, without limit, but it was also done at the home office of the company, and with their approbation and consent. If the company thus consented, the restriction upon the agent's authority to waive any stipulation or condition is of no importance, and the waiver

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may have been complete, without regard to the acts of the agent. As the evidence stood, the case was properly submitted to the jury, upon the question of waiver, as well as upon the other questions of fact, and there was no error in refusing to direct the jury that the defendant was not liable under the policy of September 30, 1871, nor in any other of the rulings upon the trial.

The judgment should be affirmed, with costs.

*Judgment affirmed.*

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FRAZIER v. McCLOSKEY, appellant.

*Evidence — slander — repetition of slanderous words.*

In an action for slander, evidence was given of the repetition by defendant, on different occasions, of the words laid in the complaint. *Held*, admissible for the purpose of showing malice.

The fact that the repetition took place after the action was brought, would not exclude evidence of it.

THIS action was brought to recover damages for slander, and was tried, at Warren county circuit, in September, 1872, and a verdict rendered for plaintiff for \$300.

Judgment was entered upon the verdict in favor of the plaintiff, and the defendant appeals.

The plaintiff charged defendant with having maliciously and falsely said of plaintiff: "I want you to pay me for the hay you stole from me. Henry O. Frazier says you took half a ton of my hay, and if you don't pay me for it I will have a warrant on you before to-morrow for stealing that hay, which I can prove you stole by Henry O. Frazier." Also, "The damndest stealing is going on; Dr. Frazier is stealing my hay." Defendant put in an answer, containing a general denial, and matter in mitigation. Proof was introduced to show the speaking of the words alleged, and proof of other similar words, after the suit was brought.

The exceptions taken relate to the introduction and rejection of evidence.

The case was submitted upon printed points.

*Isaac Mott*, for appellant.

*Brown & Shelden*, for respondent.

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MILLER, P. J. The objections urged to proof of other declarations of defendant, substantially, repeating the alleged slanderous words charged in the complaint, were not well taken. The rule in such cases is that the plaintiff may show that the words laid in the complaint were repeated, on different occasions, for the purpose of showing malice. *Titus v. Sumner*, 44 N. Y. 266. In *Root v. Lowndes*, 6 Hill, 518, a new trial was granted because the judge erred in directing the jury that the words *not laid in the declaration* were proper to be considered, for the purpose of enhancing the *damages*. If it can be claimed that this decision conflicts with *Titus v. Sumner*, it should not be regarded as controlling, as the latter is the last case in which the principle is decided. Nor, if the rule is a sound one, is there any good reason why such proof should be excluded, because the words were altered after the action was brought. It is claimed that the words proved were different from those stated in the complaint. The charge in the complaint was, in substance, that the plaintiff stole hay. The proof given was, that the defendant said he was a damned thief. Both of the charges related to stealing, were substantially the same, and the latter was but a repetition of the charge of larceny. When offered, it did not appear that it related to any charge but that alleged, viz., stealing hay, and if the evidence afterward showed differently, the defendant should have moved to strike out the proof objected to for that reason. The alleged record of conviction was properly excluded, because,

1st. There was no such issue made by the pleadings, and the proof of a repetition of the charge would not authorize it.

2d. It did not show jurisdiction on its face, as no charge was made, under oath or stated, for which a conviction could be lawfully had. The question put to plaintiff as to his consenting to take the hay, was not material, and had been substantially answered.

The judgment must be affirmed, with costs.

*Judgment affirmed.*

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PEOPLE V. LIVERPOOL, LONDON AND GLOBE INSURANCE COMPANY.

*Insurance — fire policy — concealment of facts by insured — insurable interest — limitation of action on policy.*

The doctrine that the assured is bound, although no inquiry be made to disclose any fact within his knowledge, is not applicable, at least, to its full extent to policies of insurance against fire.

In an action upon a fire insurance policy, a defense was that carpenter work was being done in the building insured, which was not disclosed to the insurers. There was no actual concealment or fraud proved, no misrepresentation or intentional suppression of facts, nor was any inquiry made, at the time of issuing the policy, as to the uses for which the building was to be applied. *Held*, that it was for the jury to say whether there was a concealment of the facts by the insured which would avoid the policy.

The trustees of an asylum, in pursuance of an act of the legislature, conveyed such asylum to the people, and a fire insurance policy was issued in the name of the people. *Held*, that the people had a right to insure in their own name for the benefit of the owners, and to bring action as trustees for a loss on the policy.

By a provision of a policy "in any case of a disputed claim," no action should be maintained unless it was instituted "within twelve months after the alleged cause of such claim." After a loss on the policy, proofs of loss were forwarded to the insurers, who made several formal objections to their sufficiency, and asked for further proofs, but made no objection to the claim for loss. *Held*, that the insurers, by making only formal objections to the sufficiency of the proofs, admitted that the claim was not a disputed one, and waived, for the time, the provision as to the time of commencing an action, and an action could be brought after the expiration of the twelve months.

EXCEPTIONS ordered to be first heard at general term.

The cause was tried at the Albany circuit, in December, 1872. The action was upon a policy of insurance issued by the defendants on the Binghamton inebriate asylum. It appeared upon the trial, that in 1867, in pursuance of an act of the legislature, the trustees of said asylum conveyed it to the State.

On October 28, 1869, the defendants issued to the people a policy of insurance upon the building for one year. Three thousand dollars was upon the rear buildings or wing.

On March 4, 1870, this rear wing was wholly consumed by fire, and the damage and loss exceeded the amount insured, so that, if the defendants are liable at all, they are liable for the full amount of \$3,000, and interest.

On May 24, 1870, proofs of loss were sent by Austin Birdsall,

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claiming to be vice-president of the board of trustees of the asylum, to James Hendricks, at Albany, who was the general agent of the company.

These proofs of loss were objected to by defendants, by letter of June 4, 1870, for certain reasons therein specified. It also appeared in evidence that William R. Osbourn, the treasurer of the asylum, and a member of the board of trustees, was, at the time of the issuing of the policy, and had been for some years, the local agent of the defendants in the city of Binghamton, and was directed to issue the policy in question. That on the 25th of October, 1869, Osbourn sent an application for the insurance, which is referred to in the opinion. And that at this time there was carpenters' work, in making repairs in rebuilding the building insured, being done on the premises.

Defendants' counsel moved for judgment in the case, dismissing the complaint, upon the whole case as presented, upon the ground:

First. That the plaintiffs have no claim against the defendants upon this policy of insurance, because the State had not, and has not, the ownership of the property in question.

Second. A condition precedent to any recovery is proper proof of loss, and such proper proof has not been given. There is no proof of loss by the party insured, that is, by the people of the State.

Third. The suit was commenced more than twelve months after the alleged cause of the claim, that is, nineteen months after the loss.

Fourth. The policy was void, *ab initio*, because the application did not truly state the condition of the property, and there was concealment, or fraudulent representations, or both of these, which avoided the policy.

The court dismissed the complaint, on the ground stated in the opinion. The plaintiffs' counsel asked the court to submit to the jury whether the company in taking the risk relied upon their own knowledge, or the representation of the plaintiffs; also, the question whether Osbourn had knowledge, which requests were refused by the court. The plaintiff duly excepted to the rulings, and a bill of exceptions was made and settled, which the court directed should be first heard, at general term, with a stay of proceedings.

*Francis C. Barlow*, attorney-general, for plaintiff.

*N. B. Hoxie*, for defendant.

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MILLER, P. J. The plaintiffs claim to recover in this action, upon a policy of insurance, issued to them by the defendants, on the 28th of October, 1869, on the New York State Inebriate Asylum, for the sum of twenty thousand dollars. At the circuit, the judge, passing by several grounds which were urged, dismissed the plaintiffs' complaint for the sole reason that the person making the application who was the defendants' agent, for the purpose of obtaining and issuing policies in the locality of the asylum, was not the agent of the company so as to bind them in this policy, and there being a carpenter's shop on the premises, the policy was void, because the application did not state truly the condition of the property insured, and by means thereof there was a concealment of a material fact in applying for the insurance.

If the dismissal can be upheld, upon any of the grounds which were taken, or upon any other arising on the evidence which could not have been obviated by the plaintiffs, then there was no error.

The ground taken by the judge, presents the most important question in the case, and may therefore very properly be first considered. The concealment of a material fact, under ordinary circumstances, would necessarily vitiate the policy; but if the person who receives the application, accepts the insurance, and issues the policy, is an authorized agent of the company, and has knowledge or means of knowing the existence of the alleged fact, and voluntarily accepts the insurance, with such knowledge, and without interposing any objection on that account, such act of the agent would constitute a waiver of the increased risk.

It is argued by the learned counsel for the plaintiffs, that Osbourn was the defendants' agent in the transaction, although he was treasurer of the asylum; that at least the question whose agent he was, should have been submitted to the jury; that notice, if any he had, of the carpenters' work came to him while he was acting as the agent of the company, and, even conceding that he was both the agent of the insurer and the insured, that no such defense was interposed in the defendants' answer, or made at the trial, and, therefore, the difficulty, if it existed, was obviated. These views present serious questions which are not free from embarrassment and are entitled to careful consideration. As we are of the opinion that this branch of the case may be properly disposed of, without regard to the points stated, we will proceed to examine the question whether admitting Osbourn to be only the

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agent of the plaintiffs, or that he did not acquire notice, while engaged in the business of the defendants, there was still any concealment which avoided the policy.

The application for insurance, which was introduced in evidence, is of the most general character. It does not state whether the building insured is of stone, brick or wood, or describe its particular dimensions or location. The same remark applies to the policy of insurance, and one of the conditions and stipulations to which the policy is subject, provides that the basis of the contract is the application of the insured, and if it does not truly describe the property, the policy shall be null and void. The policy itself contains no special provisions in reference to an omission to state, with entire accuracy, every thing which has any relation to the risk taken, nor were any questions asked or propounded in the policy, or by the defendant's agent, in regard to the same. The insurer has a right to take all risks, and at such rates as may be agreed upon. He has also a right to relieve the insured from all responsibility in giving information, and circumstances may arise where such an intention may properly and legitimately be inferred. If an applicant desires his house insured, and no questions are asked, and no attempt made at concealment, can it be said that there was fraud, because a portion of the house was occupied by carpenters who were engaged in making reparations, and that it was not a house, as a matter of law? If the application was to insure a house, and it was proved to be a carpenter's shop or a manufactory where combustible materials were employed, it might well be urged that the facts appearing were evidence of concealment, but without some proof of an intent to conceal or defraud the company, where it is not thus entirely clear from the circumstances, it is a fair question for a jury to determine whether there was any such concealment. The doctrine that the assured is bound, although no inquiry be made to disclose every fact within his knowledge, is not applicable, at least to its full extent, to policies of insurance against fire. *Burritt v. Saratoga C. M. F. Ins. Co.*, 5 Hill, 192.

In the case cited, after laying down the foregoing proposition. BRONSON, J., says: "If a man is to consent to insure my house, without taking the trouble to inquire of what materials it is built, how it is situated with reference to other buildings, or to *what uses it is applied*, he has no ground of complaint that the hazard proves to be greater than was anticipated, unless I am chargeable with

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some misrepresentation concerning the nature or extent of the risk. It is, therefore, the practice of companies which insure against fire, to make inquiries of the assured in some form, concerning all such matters as are deemed material to the risk, or which may affect the amount of premium to be paid."

In *Marshall v. Columbian Ins. Co.*, 27 N. H. 266, the court say, "there are cases which hold that where no inquiries are made as to the title or situation of the property, and nothing appears to show that fraud was designed, a suppression of facts will not make void the policy," and see cases there cited.

In the case at bar there was no actual concealment or fraud proved, no representation whatever, and nothing showing an intentional suppression of facts. Nor was any inquiry made as to the uses for which the building was to be applied. Can it, then, be said that the insured has reason to complain when there has been neglect in making the required investigation, and that the insurer is chargeable with concealment, because the hazard was more than ordinary risks, which may or may not have been anticipated?

It is certainly not manifest that the insured was called upon to speak, without being solicited to do so, or that, in any way, there was any intentional concealment of the real facts. When certain questions are put to a party desiring a life insurance and fully answered, it is not a fraudulent concealment if he omits to state facts material to the risk, not called for by any specific or general question. *Rawls v. Am. Ins. Co.*, 27 N. Y. 282. The rule here laid down is, at least, equally applicable where the insurers do not put any questions whatever to the applicant for insurance. See, also, Bliss on Ins. 98.

In any view which may be taken of the subject, as there was no direct proof of concealment, it should have been submitted to the jury whether the circumstances of the case showed a concealment of the facts. In *Rawlins v. Desborory*, 2 Mood. & Rob. 328, in an action upon a life insurance policy, at *nisi prius*. Lord Ch. J. DENMAN said to the jury, that if they thought the deceased, without being interrogated as to his habits, was aware of them, and knowing of their importance, *studiously concealed them from the insurers*, they should find for the defendant; but the mere *non-communication* of his habits of life, would not, of itself, vitiate the insurance, even though those habits, in the opinion of the jury, *tended to shorten life*.

Following the principle here laid down, it is quite obvious that in



a case where there were no circumstances of themselves showing a fraudulent intention, it was error to take the case from the jury, who were the proper tribunal to consider all the facts bearing upon the question, and in granting the motion to dismiss upon the ground stated by the learned judge.

The objection that the plaintiffs had no title or insurable interest in the buildings, at the time of the insurance or the fire, is not well taken. This point was not very fully argued, and no sufficient reason is given for upholding the nonsuit upon any such ground. It is, however, a complete answer to this position to say, that the State was in possession, and, even without title, had a right to insure in their own name for the benefit of the real owners, and to bring this action as trustees of an express trust. *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606, 613. Nor is there any foundation for the objection that no accurate and particular account of the loss was rendered, as required by the policy of insurance and the conditions attached.

The principal point urged in this connection is, that the proofs were not made by any person authorized to represent the people of the State. The proofs presented were signed and verified by the vice-president of the asylum. As the State can only act through agents, and the legislature have recognized the board of trustees and placed them in charge of the asylum as such agents, the authority of the vice-president cannot well be disputed by the defendant. In other respects no serious questions are urged as to the deficiency of the proofs, and they appear to be full and ample and within the reasonable requirements of the policy.

The omission to bring a suit for more than twelve months after the occurrence of the fire, we think, is not a bar to the plaintiff's right to recover in this action. The condition of the policy was, "that in any case of a disputed claim," no suit or action should be sustained, unless such action be instituted "within twelve months after the alleged cause of such claim," and the question to be determined turns upon the construction to be given upon language by no means clear, and which is quite ambiguous. While limitations of this character are held to be valid, they are also regarded with extreme jealousy by the courts, and may be waived by any act or declaration which induces the insured to wait. *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 253; *Dobin v. F. J. S. Ins. Co.*, 5 Lans. 275, S.

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C., 57 Barb. 5, § 8; *Carrol v. C. H. Bank. Ins. Co.*, 10 Abb. 316; *Mayor, etc., v. Hamilton Ins. Co.*, 39 N. Y. 45.

In the last case cited, it was held that the limitation in a policy that the action shall be commenced "within the term of six months after any loss or damage shall accrue," is to be construed in connection with the other conditions of the policy, and, thus construed, means that the action shall be commenced within six months after the right to sue the company has accrued. The fire in the case last cited occurred on the 5th day of October; the proofs of loss were not adjusted until the 12th of February, and the suit was decided to be properly brought within six months after the expiration of sixty days from the latter date.

The claim here was first presented on the 24th of May, and on the 4th of June the defendant forwarded objections to the proofs of loss, stating that they objected to the papers as being insufficient and defective, for certain informalities which were stated. The defendant did not state that they disputed the claim; but objected to the form in which it was presented. They did not deny that they had insured the property for the amount named, or specifically object to payment, or state any ground upon which they regarded it as invalid, void, or the subject of dispute. They did not claim that any concealment or fraud had been practiced, or suggest any defense to the policy, but left it open for the plaintiffs to supply the defects of proofs which were stated, without limiting the time when they should be furnished. As no time was fixed, may it not fairly be claimed, that the plaintiffs had a right to delay indefinitely furnishing the proofs, and finally to rely upon those which were furnished? If the plaintiffs had furnished further and corrected proofs at a future period, and the defendant had refused to pay, on the ground that there had been fraud or concealment on account of any other supposed defense, then there would have been a "disputed claim" within the meaning of the condition.

As the case stood, with no intimation, whatever, that the defendants meant to interpose any but mere formal objections, with not a word in their notice about a dispute; with no notice afterward that it was intended to assail the claim, substantially, or to refuse payment, if proper and satisfactory proofs were made, or make any defense, whatever, to the claim; and, in fact, with an implied suggestion of payment, upon further proofs being presented, it cannot well be claimed that there was such a dispute as was contemplated

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by the condition stated, giving to the phraseology employed that liberal construction which the authorities warrant. When a party disputes a claim, he refuses to pay, denies its validity, and alleges such defense as he has. He is not content with making technical objections to the mode and manner, and particular form in which it is presented. By interposing mere formal objections, he virtually concedes that he has no other, and, at least, for the time being, waives any other. He does not dispute the validity or legality of the claim itself.

The communication, therefore, of the 4th of June did not of itself make out a "disputed claim" within the meaning of the policy, and as the defendant did not, at any time afterward, and until it set up a defense to the action brought, dispute the claim of the plaintiffs, the action was brought in due season.

As the nonsuit cannot be upheld upon any of the grounds stated, a new trial must be granted, with costs to abide the event.

*New trial granted.*

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PEOPLE *ex rel.* BARLOW, Attorney-General, etc., v. CANAL BOARD (2).

*Real property — excavations — damage to adjoining soil and buildings — negligence — Laws 1872, chap. 786.*

The legislature, by a special act (Laws 1872, chap. 786), authorized the canal board to investigate the claim of a private firm for injuries done to the premises of said firm, by excavations made in repairing the canal, and if the facts proved were such as would create a legal liability, if proved, in a civil action against an individual to award damages to such firm. It appeared that the employees of the State excavated alongside the wall of a building standing upon the extreme boundary of the premises of said firm, in consequence of which the soil under such wall fell out and let down the building. The soil was quicksand, and the proof was sufficient to justify a conclusion that the soil would have fallen out if no building had been erected upon the lot. *Held*, that an individual would have been liable for injury done to the adjoining lot, and the canal board were authorized to make an award of the damages under the act in question to the extent of the injury done to the soil, but not for the building.

The whole amount allowed by the act was awarded. It did not appear distinctly what portion of the damages claimed by the firm was for injury to the building or what for injury to the lot alone. *Held*, that the award could not be set aside on that account.

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The wall which fell was protected by substantial piling. The excavation was made more than two feet below and the earth removed for about seventy-five feet along and the excavation was left in that condition. *Held*, that there was evidence that the work was so negligently performed as to create a liability.

*Held*, also, that the firm was entitled to reasonable notice of the intended excavation, in order to enable them to protect their building.

CERTIORARI to review proceedings of canal board.

The premises of Pratt & Co., in the city of Buffalo, were bounded on the south by the berme bank of the Erie canal. Upon these premises, in 1845, they erected a building, the south wall of which was upon the south line of the lot.

The wall remained in good condition until the winter of 1871, when it was undermined by the removal of the soil adjoining on the south, by certain employees of the State engaged in enlarging the Erie canal; and Pratt & Co. sustained damage thereby.

The evidence returned to the writ of *certiorari* shows that the excavation made was five or six feet lower than the old foundation of Pratt & Co., and that about seventy-five feet along the wall was excavated and left over night, without any protection.

In 1872, the legislature passed an act (Laws 1872, chap. 786), authorizing and requiring the canal board to hear and investigate the claim of Pratt & Co., and allow them such sum (not exceeding \$8,000) as would re-imburse them for that damage.

The canal board have heard the claim, taken proofs, and made the investigation required by that act, and on the 19th day of August, 1873, by resolution duly passed, declared Pratt & Co. justly entitled to compensation for damages in the sum of \$8,000, and awarded the same to Pratt & Co., under said act.

The relator brought a common-law *certiorari* to review the proceedings. The other facts appear in the opinion.

*Francis C. Barlow*, attorney-general, for relator.

*R. L. Burrows*, for Pratt & Co.

MILLER, P. J. This is a common-law *certiorari*, brought to review the proceedings of the canal board in awarding the sum of \$8,000 to the firm of Pratt & Co., of the city of Buffalo, in pursuance of an act of the legislature, entitled "An act for the relief of Pratt & Co." Laws of 1872, chap. 786.

Under the act cited, the canal commissioners were only authorized to make an award in case "they shall become satisfied, after due investigation, that the facts proved are such as would create a legal liability, if proved, in a civil action against an individual or a corporation." If, upon the facts presented, a civil action could have been maintained against an individual who had been injured, against the party causing the injury, then the canal commissioners were fully justified in making the award under the act in question. After a careful examination, I have arrived at the conclusion that a legal liability was created by reason of the relation which Pratt & Co. sustained as owners of the land adjoining to the canal, where the excavations were made, which were the means of undermining the land of Pratt & Co., and of causing the injury complained of.

It is a familiar principle, well settled by authority, that the proprietor of land has a natural right to the lateral support of the soil of his premises, by the adjoining lands so long as he allows them to remain in a state of nature. But such right does not extend to cases where the owner, by building or otherwise, has increased the lateral pressure upon the adjoining soil. *Lasalla v. Holbrook*, 4 Paige, 169; *Farrand v. Marshall*, 19 Barb. 380; S. C., 21 Barb. 409. And where the owner, in the exercise of ordinary care and skill, in making an excavation for the improvement of his own lot, had dug so near the foundation of the plaintiff's house as to cause it to crack and settle, it was held he was not liable for the injury. *Panton v. Holland*, 17 Johns. 92; *Thurston v. Hancock*, 12 Mass. 223. This principle is indorsed in *Lasalla v. Holbrook*, *supra*, and is stated in the marginal note with the addition and proviso: "if such excavation would not have injured the adjacent lot in its natural state." Although this language is not employed by the chancellor in his opinion, yet the principle laid down, and the authorities cited, appear to uphold it. Hence, it was held in *Thurston v. Hancock*, 12 Mass. 223, that the defendant was not liable for an excavation which placed the plaintiff's house in a dangerous position, but the plaintiff was entitled to recover for the damage, if any, which had been occasioned by the loss of his soil, in consequence of such excavation. There appears to be no sufficient reason why a person erecting buildings upon his own land, by means thereof should be subjected to any greater loss or injury than what the buildings actually create. In *Farrand v. Marshall*, 19 Barb. 386, some

language is employed in the opinion, which it is claimed holds, that by the erection of buildings on the margin of his own land, the party is himself at fault, and, therefore, not entitled to recover. This rule is placed in the opinion "upon the familiar doctrine that he who complains of the use which another makes of his own property must himself be without fault." The person thus building would certainly be free from fault, if the building did not create a sufficient pressure to cause the injury, and hence the doctrine can only be applicable where such was the fact. The learned judge cites 12 Mass. 220, which, as we have seen, sustains a recovery for the loss of the soil, but not the building, in consequence of the excavation, and regards it as erroneous, because the plaintiff was entitled to compensation for the injury to the house.

It is, therefore, apparent that the observations made were intended to apply to cases where the buildings created a pressure and thereby contributed to the injury. In support of the doctrine laid down are the remarks of GARDNER, J., in *Hay v. Cohoes Company*, 2 N. Y. 162, where he says, "no degree of care in the excavation by the pit owner would, I apprehend, justify the transfer of a portion of another man's land to his own." See, also, Washb. on Easements, 431, 432.

It follows, necessarily, from the rule laid down in *Lasalla v. Holbrook*, *supra*, that if the weight of the building does not in any degree affect the land upon which it is built, by creating a pressure outwards, upon the soil beneath, and the excavation would have injured the lot in its natural state, then the party making the excavation is liable for the injury to the soil. In the case before us the evidence shows that the excavation let out the quicksand from beneath the foundation, thus undermining the wall and causing the lot to cave in and let down the building, and the proof was sufficient to justify a conclusion that the same result would have followed if no building had been erected upon the lot.

If the principle stated is sound then the canal commissioners were authorized to make an award of damages under the act in question, to the extent of the injury done to the soil; but not for the buildings on the land. It does not appear distinctly what portion of the expenses incurred were for the restoration of the building or what portion for the lot alone, and it is therefore difficult to say whether too large an amount of damages was awarded. If this court can properly review the evidence taken before them, I am inclined to

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think that before error can be alleged in this respect, that it should be made to appear affirmatively, that the amount allowed was more than sufficient to compensate for the actual injury sustained, and as this is not apparent the award cannot be set aside on that account.

There is also another ground upon which I think the award of the commissioners can be upheld, and that is, that there is some evidence that ordinary care and skill were not used in making the excavation. The proof shows that the wall of Pratt & Co. was protected by substantial sheet piling; that an excavation was made from two to two and one-half feet deeper than the piling, and from five to five and one-half feet lower than the wall and the earth removed for the distance of about seventy-five feet along the piling with no wall built or earth filled in to sustain it, and left over night in that condition until it fell. An excavation of the soil and the putting up of the wall in short sections might have obviated the difficulty and prevented the accident, and as the case stood, there was evidence from which it might fairly be inferred that the work was negligently and carelessly performed so as to create a liability.

I am not prepared to assent to the position taken by the relator that the right existed to excavate without using reasonable care and skill. At least notice should have been given, to enable Pratt & Co., who were the persons to be affected, to provide against such a catastrophe. Some of the authorities cited sustain the doctrine. In *Panton v. Holland*, a new trial was granted upon the ground that the question of negligence, in not taking all reasonable care, was not submitted to the jury. The same principle is distinctly recognized in *Lasalla v. Holbrook*, and it is there said: "From the recent English decisions it appears that the party who is about to endanger the building of his neighbor by a reasonable improvement on his own land, is bound to give the owner of the adjacent lot proper notice of the intended improvement, and to use ordinary skill in conducting the same." In *Radcliff v. Mayor of Brooklyn*, 4 N. Y. 200, BRONSON, Ch. J., expressly excepts from the general rule that a man is not answerable for the consequences of enjoying his own property, cases where the injury has resulted "from the want of proper care or skill on his part." Upon principle there appears to be no ground for holding, even if a man has an absolute right to dig on his own land to any extent, that he is not answerable for want of care and skill or for negligence. See, also, Washburne on Easements, 436, § 18; 439, § 13; 441, § 15; where reference is made to the

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effect of negligence and unskillfulness, and cases cited. Also, *Foley v. Wyeth*, 2 Allen, 131; *Richardson v. U. C. R. R. Co.*, 25 Vt. 465, 471.

In *Peyton v. Mayor of London, etc.*, 9 B. & C. 725, which is relied upon by the relator, the action was brought to recover damages against the owner of an adjoining house for pulling it down and causing injury thereby, and it was held: 1st. That upon the declaration, the plaintiff could not recover on the ground of the defendant's not giving notice that he was about to pull down the house, as that was not alleged as a cause of injury. 2d. That as the plaintiff had not alleged or proved any right to have his house supported by the defendant's he was to protect himself by shoring, and could not complain that the defendant had neglected to do it. The proof showed that the defective state of both houses had been known to both parties, and that the operation of taking down was carried on from day to day, and must have been known and seen by the tenant and occupier of the plaintiff's house.

The facts presented are entirely different from the case at bar, where the claimants had no notice whatever, and no opportunity was offered to them to protect themselves against injury.

*Charles v. Ranken*, 22 Mo. 574, holds, that the law does not exact of the owner of a building adjoining another, in taking down an old and in laying a new foundation, the same forbearance, care and expense for the security of his neighbor's property, that he would have found it for his interest to have taken for his own. No question of a want of notice appears to have been made in this case, and if it can be regarded as holding that the person removing the building, and causing the injury, is not liable for negligence, it is adverse to the general current of authority.

As the decision of the commissioners can be upheld upon the grounds stated, I have not deemed it necessary to discuss the question which was elaborately presented on the argument, as to what questions can be raised in a common-law *certiorari*, as well as some other points made. The proceedings of the commissioners must be affirmed.

*Proceedings affirmed.*



## RUTHERFORD, appellant, v. AIKEN.

*Evidence—former adjudication—waste—growing timber—intent.*

In an action by the owner of the fee of a farm, against the lessee of the tenant for life for waste, a judgment in a former action for waste upon the same premises, between the same parties, but not for the acts alleged in the action at bar, was offered in evidence. The question at issue was whether the acts complained of in the action at bar were waste. *Held*, that the judgment was inadmissible.

The alleged waste consisted in cutting growing timber for fuel. At the trial the court charged that if the trees which were down were unfit for fuel, or would cost more than their value to secure them, the defendant was not bound to take them. *Held*, correct. The tenant for life of farming land is entitled to cut down and use so much of the standing timber therein as may be necessary for fuel, etc., and is not compelled to cut timber which may cost more than its value to secure.

The complaint alleged that the defendant maliciously cut the timber, and the plaintiff sought a forfeiture and eviction. *Held*, that defendant was entitled to testify that he cut the wood in good faith, believing he had a right to do so.

APPEAL from a judgment in favor of defendant, in an action for waste, entered upon the verdict of a jury, and from an order denying a new trial. The facts appear in the opinion.

*Edw. C. James*, for appellant.

*Magone & Holbrook*, for respondent.

Per CURIAM. This action is for waste in cutting trees for fuel. The plaintiff is owner in fee of the premises, a farm, subject to a life estate in Jane O'Neil. Defendant is O'Neil's tenant, for years, of the farm. Defendant in his answer denies the waste.

The case was tried at the St. Lawrence circuit, and resulted in a verdict for the defendant. Plaintiff moved for a new trial on the minutes, which was denied. He now appeals from the judgment entered upon the verdict, and from the order denying a new trial.

On the trial the plaintiff offered in evidence the record of a former judgment obtained by him against the defendant, in an action for waste, committed by defendant upon the same premises. The same relations were then existing between the parties in respect to the

right to and occupation of the premises, as at the commencement of this suit. The evidence was excluded, and plaintiff excepted.

The defendant, while a witness on the stand, was asked by his counsel to state whether he acted in good faith in cutting the wood, believing he had a right to it. This was objected to, but admitted, and plaintiff excepted.

Defendant's counsel requested the court to charge the jury that "a tenant for life has a free-hold, and his rights differ from a tenant for years as nature may supply the defect." To this the court said, "of course there is a technical difference, and I make the correction in accordance with the request," and the plaintiff excepted.

Defendant's counsel also requested the court to charge the jury that if they should find that the decaying pines, hemlock and other down trees were unfit for fuel, or would cost more than their value to secure them, the defendant was not bound to get those trees.

The court so charged, and remarked, "I will put the question to them whether they were such as the defendant, as a farmer, ought to use." The plaintiff excepted to such charge and remark.

The former judgment was properly excluded. No question at issue would have been proven by it. There is no identity in the questions at issue in the two actions, and it is only of such questions that a former adjudication is evidence. The question in this suit was, whether the cutting of the trees alleged and proved in this suit to have been cut, was waste? That question was not in the former suit. No issue was made in respect to the title to the property. Whether the acts complained of were, or were not, waste, was the sole question.

In regard to proof of good faith, in the cutting of the wood by defendant, as made by defendant's testimony, there was no error. It did not lie with the plaintiff to object to proof of any fact by the defendant, controverting a fact alleged in his complaint. In the complaint it is alleged that the defendant maliciously cut the wood in question. He is not aggrieved by a denial of that allegation in the proof. Besides, the evidence was competent under section 452 of the Code.

The plaintiff seeks a forfeiture and eviction, which he is entitled to only in case the waste was done in malice. The plaintiff has the reversion contemplated by the section, and the motive or intent was a competent subject of proof by the defendant. It was a fact properly proved by the testimony of the defendant himself. When an act is

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illegal, the intent of the offender is immaterial, as in the case of usury it is immaterial whether the offender intended to violate the statute against usury or not, if he knowingly took more than seven per cent for the loan of money it is usury, *per se*. So, in some cases, acts are *per se* fraudulent, independently of any fraudulent intent. But in cases where the character of the act depends on intent, proof of intent is admissible. *Foster v. Janin*, 50 N. Y. 437.

The exception taken to the answer to the request to charge that the rights of a tenant for life, and a tenant for years, differ, was not well taken. It is apparent that all the court intended to say was, that there was a technical difference, and such is the fair construction to be placed upon the language employed. If it had been otherwise, the response would have been without any qualification or limitation; as it was, the latter portion of the request, which was a reason stated by counsel, for the rule, must be considered as not comprehended in the answer of the judge.

There was no error in the answer of the judge to the request to charge as to the decaying timber, and down trees, unfit for fuel, or which would cost more than their value to secure. The judge did not charge specifically, as requested, but with a qualification that the jury were to determine whether they were such as the defendant, as a farmer, ought to use.

It is manifest that the defendant was not bound to take the trees which were unfit for fuel, and it appears to be equally clear that he was under no obligation to procure such as would cost more than their value to secure. The defendant was lawfully in the possession of the land, with all the rights and privileges of a tenant for life. It cannot be denied but that a tenant for life, of farming land, is entitled to cut down and use so much of the standing timber on the farm, as may be necessary for fuel, etc. *Van Dusen v. Young*, 29 N. Y. 30. And if he is compelled to cut timber which it would cost more than its value to secure, instead of cutting such as is otherwise at hand, he would be deprived of a portion of his rights. The law does not demand such an unreasonable exercise of his privileges, or impose so harsh a rule—and while it prohibits waste, it also permits a reasonable enjoyment of the rights which are conferred by the grant. The judge had already substantially charged that if there was down wood, or standing dry wood on the farm, and the defendant had seen fit to omit obtaining that for fire, and

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cut growing timber, that it would be waste, and he would not have been justified in holding that the defendant was bound to cut decayed and down trees at an expense exceeding their value.

There was sufficient evidence to sustain the verdict, and no such preponderance in favor of the plaintiff as to authorize a new trial on that ground.

A new trial must be denied, and the judgment and order affirmed with costs.

*Judgment affirmed.*

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MCENTEE *et al.* v. SCOTT.

*Sale — personal property — conditional sale — title.*

It was agreed by parol, between the vendor and purchaser of certain machinery, that the title thereto should remain in the vendors until it was paid for. A note was given for the purchase-price. *Held*, that the agreement was valid, and that the title remained in the vendors, notwithstanding the giving of the note, and that they could not be divested of it by a transfer of the real estate upon which the machinery was located.

ACTION to recover for an alleged conversion of a portable steam engine, boiler, rubbing bed, pulleys, shafting and other apparatus connected with the engine. The plaintiff had a verdict; the entry of judgment was stayed and the exceptions were ordered to be first heard at general term.

The evidence for the plaintiffs tended to show that about March 1st, 1870, one Dillon sold to one Smith, who was engaged in the business of marbleizing mantels at Rondout, the property in question upon the condition that the title should remain in Dillon until paid for. Subsequently Smith gave a note for a part of the purchase-money signed by himself and one Bailey, but the note was never paid. On the 28th of September, 1870, Dillon transferred to the plaintiffs the title to the said property and all rights and causes of action for the conversion of the same.

The evidence for the defendant tended to prove that on the 4th of February, 1870, the said Smith made a contract with one Bush for the purchase of the real estate in which he carried on his business, which contract, on the same day, he assigned to the defendant.

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Smith continued in possession of the real estate till July, when defendant received a deed of it, and entered into possession, and claimed the machinery in question.

At the close of the evidence the court held that the plaintiffs were entitled to recover, and that the only question for the jury was the question of damages.

*T. R. Westbrook*, for defendant.

*A. Schoonmaker, Jr.*, for plaintiff.

MILLER, P. J. The evidence in the case shows a contract between the parties by which the title to the machinery in question was to remain in the vendors until the whole price was paid. The vendors continued the owners of the property under this agreement, and no transfer of the same, and the real estate upon which it was located, could divest them of the title. See *Austin v. Dye*, 46 N. Y. 500; *Sheldon v. Edwards*, 35 id. 279; *Godard v. Gould*, 14 Barb. 663.

That parties may lawfully enter into such an agreement, and that when made, the title remains in the vendor until the purchase price is paid; and that the agreement prevents it from becoming any thing but personal property is established by numerous authorities.

*Voorhees v. McGinnis*, 48 N. Y. 278, is not, in any way, in conflict with the principles stated; for it will be seen that the decision that the boilers, etc., were fixtures, was based upon general principles, which were held applicable, unless *there was no specific agreement to the contrary*, or some circumstances controlling the general rule; that the boilers, engines, etc., became a part of the realty, and passed to the plaintiff upon his purchase. See pp. 286, 287.

The testimony being uncontradicted as to the parol agreement, although a note was given for the purchase-money, there was no question for the jury to pass upon, and no error in the refusal of the judge to submit the question raised to their consideration.

The offer to prove the understanding between Scott and Smith, as to the conditions upon which he, Scott, advanced money, could not affect the plaintiff's rights. So, also, the proof offered as to the entries made by Bailey in the books are not shown to be material.

There was no error, and judgment should be ordered on the verdict for plaintiff, with costs.

*Judgment ordered on the verdict.*

# FOURTH DEPARTMENT.

GENERAL TERM, DECEMBER, 1873.

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KELLY v. DEE, appellant.

*Defense—settlement—agreement to settle, when a defense.*

Plaintiff brought action against defendant for work, etc. The cause was referred. Upon the day noticed for trial, the parties agreed upon a settlement. Both informed the referee of that fact, and he left the place where the trial was to be had. Before the necessary papers were drawn, plaintiff refused to adhere to the settlement, although defendant tendered performance on his part. The referee was sent for, and he came and began the trial. Defendant objected to the proceedings, on the ground of the settlement, evidence of which was offered and rejected. The trial was commenced and adjourned. Before the next hearing, defendant, by leave of court, at special term, put in a supplemental answer, setting up the settlement. The trial proceeded to a conclusion. The referee found that there was no settlement, and gave judgment for the amount of plaintiff's claim.

*Held*, That the agreement made between plaintiff and defendant, and the defendant's tender of performance, constituted a good cause of action in equity, for specific performance, and defendant was entitled, under the Code, to set it up as a defense in this action.

APPEAL from a judgment in favor of plaintiff, entered upon the report of a referee. The facts sufficiently appear in the opinion.

*Luddington & Gillespie*, for appellant.

*Gott, Garfield & Hoyt*, for respondent.

MULLIN, P. J. The plaintiff sued the defendant to recover for work, labor and services, and for board of defendant's hired man. The answer denied the matters alleged in the complaint, and alleged a set-off and counter-claim. The plaintiff replied, denying the

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counter-claim. The issues were referred, and the trial was commenced on the 7th of February, 1873. On that day, the defendant's counsel objected to proceeding with the trial, on the ground that the issues and subject-matter of the action had been settled, and offered evidence to prove such settlement.

The plaintiff's counsel objected to the evidence as improper and irrelevant. The objection was sustained, and the evidence rejected. The further hearing was then adjourned until the 14th of February. On the 14th, an order was granted, by the special term in Onondaga, permitting the defendant to put in a supplemental answer, setting up the settlement of the action; and a supplemental answer, setting up said settlement, was put in. The trial proceeded on the 14th of February. The plaintiff gave evidence tending to prove the causes of action set out in his complaint. The defendant gave evidence tending to prove that the plaintiff did not work for him as long as he claimed to have done, and that he (plaintiff) consented that there might be deducted from his claim one-half of his wages, for the months of November and December, 1871, and for January and February, 1872. The plaintiff denied having given such consent. The referee finds the defendant indebted to the plaintiff for the full amount of his account, as proved by him, together with interest, and thus necessarily finds that the plaintiff did not consent to the deduction claimed by the defendant.

As to the settlement set up in the supplemental answer, it appears that, on the 7th day of February, the parties met, in the absence of the referee, and commenced negotiations for a settlement of the suit. Terms were agreed upon, and, when the referee appeared, he was told by both parties that the cause was settled, and he thereupon left. By the terms of the settlement, defendant was to pay plaintiff \$100 in money, down, and give him his note for \$276, and pay the fees of the referee. After the referee left the room, the counsel proceeded to, and did, draw the papers necessary to complete the settlement; but, before they were executed, a misunderstanding arose as to the terms of the settlement, and the plaintiff refused to carry it out, and the referee was sent for, to go on with the trial, and he returned and did proceed and finish the trial, notwithstanding the objection of the defendant's counsel. The referee finds the facts in reference to the settlement to be as above set forth, and his conclusion is that the suit was not settled, and he orders judgment for the plaintiff for his damages and interest. The findings of the referee are upon

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conflicting evidence, and cannot be reviewed by us. The referee finds, among other things, that the defendant tendered to the plaintiff performance of the agreement entered into between the parties to settle the suit, and the defendant's supplemental answer demands judgment that said agreement be specifically performed.

This agreement, accompanied by tender of performance, constituted a good cause of action in equity for a specific performance of said agreement (Fry on Specific Performance, 971, 972), and, under the Code, the defendant is entitled to set it up as a defense to plaintiff's action.

The judgment must be reversed and a new trial ordered, before another referee, costs to abide the event.

*Judgment reversed and new trial ordered.*

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KESHAN V. GATES, appellant.

*Animals — owner of vicious horse — when liable — habit of pulling — evidence.*

Defendant owned a mare, which had a habit of suddenly "pulling" back upon her halter when excited or restless. This habit was known to defendant. He left the mare at a hotel, kept by plaintiff's employer, to be cared for, giving plaintiff no notice of the habit. While plaintiff was hitching the mare in the stable, and in doing so, had put her halter rope through a ring, she pulled suddenly back, drawing the rope through the ring. Plaintiff's finger was caught between the rope and ring and torn to pieces. *Held*, that defendant was not bound to notify plaintiff of the habit of the mare to pull. Where the vicious habit of the animal is directly dangerous, such as kicking or biting in a horse, hooking in a horned animal, or biting in a dog, the owner, if it is known to him, is bound to notify those dealing with the animal of such habit, but it is otherwise when the habit is not such as will directly inflict injury. *Dickson v. McCoy*, 89 N. Y. 400, explained. A witness for defense, on cross-examination, testified that he heard the mare was a puller before the accident in question. He also testified as to what defendant's son had said upon the subject of the mare's pulling. *Held*, that the evidence was inadmissible.

APPEAL from a judgment in favor of plaintiff entered upon the report of a referee.

In July, 1871, the plaintiff was in the employ of one Harris, who kept the American Hotel in the city of Watertown.



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The defendant lived some 15 miles distant, and was accustomed to stop with his team at said hotel. He owned a pair of mares, one of which was a restless, nervous animal, and as the referee finds, accustomed, when hitched, to pull upon her halter and occasionally break it.

The plaintiff had, on numerous occasions, while at the American Hotel, and other hotels in Watertown, taken charge of and fed and groomed the defendant's team, but did not, as he swears, and as the referee finds, know of this habit of "pulling," as it is called, of the mare in question, nor did the defendant inform him that she had such a habit.

In July, 1871, the defendant stopped with the pair of mares above mentioned at the American Hotel, and the plaintiff took charge of them and drove them into the stable.

Desiring to clean them, he took them, one at a time, and hitched them to rings in the side of the barn. While attempting to fasten the off mare, as she is called, and while putting the halter strap through the ring, one of his fingers was caught in the strap, and she suddenly stepped back and pulled on the strap, and the finger was torn off at the second joint.

The referee finds that defendant knew of the habit of the mare to pull upon the halter, and that he did not disclose it to the plaintiff.

He ordered judgment for the plaintiff for \$200 damages, together with costs, and from that judgment the defendant appeals.

*Charles Dwight and James F. Starbuck, for appellant.*

*Anson B. Moore, for respondent.*

MULLIN, P. J. The general rule is, that if a man keeps a vicious animal, that he knows to be such, and he does not take sufficient measures to prevent it from doing mischief, he will be answerable for any injury it may do the person or property of another. 1 Wait's L. & P. 846.

Where an animal is trespassing on the premises of another, the owner is liable for whatever mischief it may do, although not cognizant of its nervous habits or propensities. 1 Wait's L. & P. 849.

GROVER, J., in *Dickson v. McCoy*, 39 N. Y. 400, 403, gives a definition of vicious propensity, which must be borne in mind in considering the question of defendant's liability. He says: "By

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vicious propensity is included a propensity to do any act that might endanger the safety of the person or property of others in a given situation. Not such only as would impair the utility of the animal for the purpose for which it is kept."

If a man has a horse or other animal that is given to kicking or biting, it is his duty to take such measures as will prevent it from injuring either persons or property; and, if he cannot use it in his business and prevent the animal from indulging in its habit, he must cease to use it where the persons or property of others is exposed.

But domestic animals acquire many habits, indulgence in which may or may not be dangerous to others, depending on the circumstances in which the habit is indulged in.

Indeed, there is scarcely any bad habit that may not, at times, be dangerous.

Balking cannot be called a vicious propensity, yet should a horse balk while crossing a railroad, and the cars approaching, it might cause the destruction of the train and the lives of persons upon it.

Such a result might not happen in a hundred years, yet it may happen, and if the owner is liable for the injury done, he must cease to use a balky horse.

The defendant's horse might have pulled upon his halter a thousand times and not injure any one, yet, if the definition of GROVER, J., is to be applied as broadly as it is stated, the defendant was bound, if he knew of the habit, to cease altogether to use it if the persons or property of others were liable to be injured.

It seems to me that the vicious habits or propensities which the owner of an animal must (when known to him) guard against are such as are directly dangerous, such as kicking and biting in horses, and hooking in horned animals, and biting in dogs. These habits or propensities may be indulged in at any moment, and are inevitably dangerous.

The habit of pulling, as it is called, in horses, is not necessarily nor even ordinarily dangerous, but if the habit is known to the owner, he should use such means to guard against injury to others as experience shows to be proper.

It would ordinarily prevent mischief, to secure the animal by a halter, that it could not, by pulling, break, but that would not prevent the happening of such an accident as that which befell the plaintiff.

His was one of those injuries that human foresight cannot guard against or prevent.

No case has been cited, nor have I been able to find one in which it is held, that it is the duty of the owner of animals to disclose to third persons their bad habits, unless he is selling them, and disclosure of defects is imposed upon him as a duty.

If the habit is such as, by possibility, may be injurious, if indulged in, adequate measures to prevent its indulgence must be adopted. But, where the chances of injury are so exceedingly small that careful and prudent persons would not resort to measures of protection against their occurrence, yet injury does happen, the owner is not liable, although no measures of prevention are taken.

An owner should give notice to persons dealing with an animal that has vicious propensities, when he knows that serious injury would be inflicted if the animal should take occasion to indulge therein.

When a biting or kicking horse is left with a blacksmith to be shod, or with a hostler to be groomed, notice is indispensable to prevent serious and, it may be, fatal injury.

But who could anticipate that the plaintiff or any person would have his finger in the position in which the plaintiff's was, and that the loss of the finger would be the result.

Again, as it is impossible for any person to anticipate what injury may, under a fortuitous concurrence of circumstances, be caused by an animal indulging in the most harmless of its habits, it would follow that the owner must enter, at every hotel and blacksmith shop, upon an enumeration of all the bad habits of his horse, or be subjected to damages if, by reason of indulging in one of them, injury should result.

The case was not, in my judgment, one in which the defendant was under any legal obligation to notify the plaintiff that the horse was a "*puller*;" that duty is imposed only when the habit is one that is ordinarily and directly dangerous to either person or property.

On the trial, one Zeron, a witness called by defendant, testified that he had taken care of the horses of defendant for some two years, and had never known the off mare to pull at the halter.

He was asked, on cross-examination, whether he had heard the mare was a puller before the accident in question. The question was objected to and the objection was overruled, and defendant's counsel excepted. The witness answered he had.

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He was then asked whether he had talked with defendant's son about her being a puller, and what the son said on that subject. The defendant's counsel objected to the question, the objection was overruled, and defendant's counsel excepted. The witness answered he did talk with the son, and he told him (witness), to look out for her.

This evidence was wholly incompetent. It was wholly immaterial what the witness had heard as to the habits of the mare.

He had been called on to testify what he knew about her pulling, of his own knowledge. That evidence was competent; but what he might have heard on that subject was wholly immaterial and incompetent. Again, the statements of the son were not admissible against the father.

What influence the illegal evidence might have had on the mind of the referee, it is impossible to ascertain, but it could not be otherwise than mischievous.

Whatever our views might be on the other question, the judgment must be reversed for the errors in admitting the evidence of the defendant's son.

Judgment is reversed and new trial ordered before another referee, costs to abide event.

*Judgment accordingly.*

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DUNLAP v. HAWKINS, appellant.

*Voluntary deed — when not fraudulent — continuation of indebtedness — making up case.*

H., being in debt, purchased real estate and caused the title to be taken in his wife's name. At the time, he was indebted in the amount of \$6,400, and owned property worth \$9,700, independent of the amount paid for the real estate. *Held*, that the conveyance to the wife was not fraudulent as to the creditors of H.

A note was paid when it became due with the proceeds of another note, made and indorsed by all the parties to the first note. *Held*, that it was a continuing indebtedness; the debt secured by the first note was not paid, but merely transferred.

Manner of making up case commented upon.

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Dunlap v. Hawkins.

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APPEAL from a judgment in favor of the plaintiff, in an action to obtain satisfaction of a judgment out of real estate claimed to be conveyed to the judgment debtor's wife, in fraud of his creditors. The facts appear in the opinion.

*Tucker & Bowen*, for appellants.

*Oscar Craig*, for respondent.

MULLIN, P. J. This was a creditor's suit brought to obtain satisfaction of a judgment recovered by the First National Bank of Lockport against Elijah W. Hawkins and others, for \$3,234.89 damages, and \$26.77 costs, docketed in the clerk's office of Niagara county, on April 20, 1865, out of land alleged to have been fraudulently conveyed by the judgment debtor to the defendant.

This judgment was recovered on a note made by William W. Baker for \$3,150, payable to the order of Alden S. Baker, Jr., sixty days after date, at the Bank of Commerce, in the city of New York, and indorsed by said Alden S. Baker, Jr., Elijah W. Hawkins, Isaac Wickham and John T. Murray. Judgment was entered against the maker and all the indorsers, except Murray.

An execution was issued on that judgment to the sheriff of Niagara county against Hawkins, W. H. Baker and A. S. Baker, Jr., and he returned the same unsatisfied as to the defendants. Hawkins and all the indorsers prior to him were, at the commencement of this action, insolvent.

The judgment was assigned by the bank to the plaintiff in this action.

In August, 1863, Elijah W. Hawkins, the husband of the defendant, purchased of one Eliza F. Case a piece of land in the town of Newfane, in the county of Niagara, paid the consideration for the same, and caused a deed from Mrs. Case, for said farm, to be executed and delivered to the defendant, his wife, she paying therefor no consideration whatever.

Mrs. Hawkins subsequently sold this farm, and invested its proceeds in another, situate in the town of Hartland, in the county of Niagara, the title to which she held at the commencement of this suit. The defendant had no separate property when the land in Newfane was conveyed to her.

When that conveyance was made (August 1st, 1863), Hawkins,

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the husband, was indebted on a note for \$3,000, made by said W. W. Baker, and indorsed by Wickham, Hawkins and Murray, and dated the 30th of June, 1863, and payable on the 1st of September, 1863.

This note was paid by the proceeds of another note, dated the 29th of August, 1863, payable on the 31st of October of the same year, made and indorsed by the same parties, and for same amount.

That note was paid by proceeds of a note made and indorsed by the same parties, and for the same amount, dated the 31st of October, and payable the 3d of December, 1863.

This note was paid by the proceeds of a note made and indorsed by the same parties, for the same amount, dated the 1st of December, 1863, payable the 2d of February, 1864.

This note was paid by proceeds of two notes for same amount, made by same maker, and indorsed by A. S. Baker, Jr., and the indorsers above named, one of which notes was dated the 30th of January, 1864, and the other the 1st of February of the same year, both payable 1st and 4th of April of same year.

These notes were paid by proceeds of a note for \$3,100, made and indorsed by the parties last above mentioned, dated 1st of April, and payable 3d of June, 1864.

This note was paid by proceeds of a note for same amount, made and indorsed by same parties, dated 31st May, and payable 2d August, 1864.

This note was paid by proceeds of another note of same amount, made and indorsed by the same parties, dated 30th of July, and payable 1st of October, 1864.

This note was paid by proceeds of a note for \$3,150, made and indorsed by the same parties, dated 1st of October, and payable on the 3d of December, 1864.

This is the note on which the judgment, described in the complaint in this action, was recovered.

It will be seen from this statement that all the notes subsequent to the first were dated before the prior notes became due, except two, and these were dated on the same day the prior notes matured.

So that there was no day from the 30th of June, 1863, until the 1st of October, 1864, when Hawkins was not liable on a note for at least \$3,000.

W. W. Baker gave, or caused to be given, to Hawkins, security for his liability as indorser for him. Part of this security was a farm

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of land, known as the Harrington farm. This farm was sold and the proceeds applied on judgments against Hawkins and others, secured on paper indorsed by them. Some personal property on said farm was mortgaged to Hawkins as security for his liabilities as indorser. On the sale of the Harrington farm, this personal property was also sold to the same purchaser, and Hawkins discharged his mortgage.

The judgment on which this action is brought was by agreement between the parties not paid out of the proceeds of the Harrington farm, but was purchased by the plaintiff, under an agreement between him and Murray, that he *would* purchase and hold said judgment for a year, in consideration of which Murray guaranteed the payment thereof.

Plaintiff took an assignment of the judgment under said agreement, and, subsequently, and in 1868 an execution was issued upon it; property of the defendants therein, except Wickham, who had died, was levied on. It was afterward returned *nulla bona*.

An execution had been previously issued, and considerable personal property levied on, but it was never recovered, and the levy was abandoned.

The referee to whom the issues were referred held the conveyance to the defendant of the land in Newfane fraudulent as against the creditors of her husband, and that the land purchased by her with the proceeds of said land was liable to said creditors, and he ordered the farm to be sold, and plaintiff's debt and costs paid out of the proceeds.

The conveyance from Mrs. Case to the defendant having been procured by Hawkins, the husband, must be treated as if made by himself. It was, therefore, a voluntary conveyance and fraudulent as against the creditors of Hawkins, whose debts existed at the time of such conveyance, unless he retained in his hands property enough to pay all such creditors. *Van Wyck v. Seward*, 6 Paige, 62; *Jackson v. Post*, 15 Wend. 588; *Phillips v. Wooster*, 36 N. Y. 412; *Bank of U. S. v. Housman*, 6 Paige, 526.

Unless the conveyance procured to be made by Hawkins to the defendant was fraudulent as against creditors, because it was voluntary, there is no proof in this case authorizing the referee to find it fraudulent.

In order to determine whether H. retained in his hands sufficient means to pay the debts owing by him at the date of the deed to the

defendant, it is necessary to ascertain the amount of debts then owing by him and the value of the property retained in his hands.

Hawkins was indebted on the 1st of August, 1863, the date of the deed to his wife, on the note of June 30, 1863, being the first of the series of notes hereinbefore set forth, the last of which was the note on which the plaintiff's judgment was recovered, mentioned in the complaint. It is probable that he was also indorser for Baker in the summer of 1863, to the amount of \$2,000 more, but he testifies that his whole liability in the summer of that year did not, according to his recollection, exceed \$4,000, and might not exceed \$3,000. In July, 1863, Hawkins was liable as a joint maker of a note for \$400, payable to A. S. Delavan six months from date, and upon another note for \$1,000, payable in one year from date, and dated the 6th of July, 1863. These several debts amounted to \$6,400.

The defendant's counsel insists that the indebtedness upon the note of the 30th of June, 1863, and which did not become due until the 1st of September of that year, ought to be deducted from Hawkins' liabilities, as that note was paid by the proceeds of the note dated the 29th of August, 1863, made and indorsed by the same parties as the prior one and for the same amount. The counsel's proposition is, that although the note was paid by the proceeds of another, made for the purpose of raising the money wherewith to pay it, the indebtedness evidenced by the first note was paid, satisfied and discharged.

I cannot assent to this proposition. All the notes, subsequent to the first, were given, either on the same day the former notes matured, or prior thereto. There was not, therefore, an instant of time when Hawkins was not liable as indorser for the sum of \$3,000, being the amount of the original debt.

In the case of *Mills v. Morris*, Hoffman's Ch. 419, the action was brought by a creditor whose debt was contracted subsequent to a voluntary conveyance, by the debtor, to set it aside as fraudulent against him. The plaintiff's debt was contracted about the 1st of November, 1837. In March of that year, directions were given by the debtor to an attorney, to propose a settlement of the property in controversy, in favor of Morris' wife. That instrument was not executed until September of the same year. In February, 1838, plaintiff recovered a judgment against Morris. Morris failed, as the assistant vice-chancellor held, at the last-mentioned date.



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When the settlement was made, he owed about \$40,000, and about the same amount when he failed.

All the debts he owed when he made the settlement were paid off, but they were paid by contracting new debts, so that his liability was not changed. The assistant vice-chancellor held the settlement fraudulent and void as against the plaintiff.

The vice-chancellor adopts the views of the Master of the Rolls, in *Richardson v. Smallwood*, Jacobs, 552. The Master of the Rolls says: "But suppose a person indebted, to execute a conveyance, such, that if those who were creditors at the time complained, it would be void as against them, then if they were paid off and a new set of creditors stand in their places, does that make any difference, does it not hinder and delay these creditors, and is it not void as against them? If it be not so, it would be easy to evade the statute. The party may pay off those to whom he is then indebted by borrowing of others, and he may then say to them, 'I did not make the settlement to defraud you, but to defraud other persons who were my creditors!'"

In *Savage v. Murphy*, 34 N. Y. 508, the receiver brought the action to set aside a conveyance by a debtor to his wife and children, upon the ground that it was fraudulent as against his creditors.

The court held, that the deed was recorded with intent to defraud subsequent creditors. SMITH, J., delivered the opinion of the court of appeals. After stating the facts, he proceeded to say, "the conclusion of fraud is not refuted by the circumstance that the debts owing by him (the debtor), at the time of the transfer, were paid with the proceeds of credit, subsequently acquired by the means above stated. The indebtedness then existing was merely transferred, not paid, and the fraud is as palpable as it would be if the debts were unpaid, were owing to the same creditors who held them at the time of the transfers."

Let us now ascertain how much Hawkins was worth at the time of the conveyance to his wife, after that conveyance was made. He had title to the Harrington farm, as security for his indorsements for W. W. Baker. That farm was subsequently sold for \$16,100. There were liens upon it to the amount of nearly \$10,000, leaving about \$6,000 to be applied in discharge of the liabilities of Hawkins as indorser. He had, as further security for his indorsements, a chattel mortgage on property upon the Harrington farm that was sold with it for \$700. He held notes against the Bakers

for \$3,000. The Bakers, in 1863, were solvent, but afterward became insolvent.

Owing to the loose manner in which the evidence was taken, it is impossible to say, with any degree of certainty, what further amount of property Hawkins was worth in August, 1863, but it is more than probable that he was worth considerable more. He testifies that he owed no debts of his own; that his entire indebtedness was as indorser, or joint maker of notes for the accommodation of others.

If I have correctly understood the evidence, he had in his possession, when the land was deeded to his wife, the amount of \$9,700. Deducting from this his liabilities, \$6,400, leaves him worth at least \$3,300, over and above sufficient to pay his debts. No greater surplus could reasonably be required.

It is true, that some three years afterward the parties to the Baker notes, above mentioned, had become insolvent, and an action upon them was barred by the statute of limitations. But the inquiry as to Hawkins' pecuniary condition must be confined to the 1st of August, 1863. If he had, then, ample means to pay his debts, after conveying the farm to his wife, the validity of that conveyance cannot be made to depend upon the subsequent disposition of the property he was worth when he conveyed to his wife.

It was proved on the trial that the deed from Edmunds to the defendant, of the farm sought to be reached by the plaintiff and applied in payment of his judgment, was dated the 10th of April, 1865, and was not recorded until October, 1868.

The defendant testified that it was not kept from record with a view of defrauding any one, she did not know it was necessary to record it, and she put it in her bureau and left it there.

The referee has not found that she omitted to record the deed with a fraudulent intent, and it formed no part of the ground on which he predicated his finding, that the deed was fraudulent.

The conveyance to the defendant by her husband was not fraudulent as to the creditors of her husband, and the judgment of the referee must, therefore, be reversed.

I cannot leave this case without expressing my disapprobation of the manner the record is made up. It contains 140 pages, when all that is material in it should have been contained in one-quarter of the space.

Deeds have been presented at full length, together with the cer-

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tificate of acknowledgment, and the papers offered in evidence are copies of the record. Judgment records and executions are presented in full, when half-a-dozen lines would give to the court all the information it needed in regard to them.

A case thus made imposes great and unnecessary expense upon clients, unnecessary labor upon the court, and confuses, rather than enlightens, it.

There are several interesting questions, presented by the defendant's counsel, which, in the view we take of the case, it is unnecessary to consider.

The judgment of the referee is reversed, and a new trial ordered before another referee, costs to abide event.

*Judgment reversed and new trial ordered.*

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NELSON V. KERR, sheriff, etc., appellant.

*Action against sheriff—demand—Statute construction—Code, § 291.*

A demand is not necessary before bringing action against a sheriff for moneys collected by him upon execution, and which he retains in his hands. The Code has not changed the rule in this respect.

The provision of § 291 of the Code, that "existing provisions of law not in conflict," etc., "shall apply to executions," etc., refers to the law as established by the courts, as well as that established by the legislature.

APPEAL from a judgment in favor of plaintiff, entered upon the report of a referee.

In July, 1872, the plaintiff recovered judgment in this court against Thomas Cornell for \$2,280.38. On the 11th of that month an execution was issued on the judgment to the defendant, sheriff of Ulster county, commanding him to collect the amount of said judgment out of the personal or real property of the defendant therein.

After the receipt of said execution by the sheriff, and on the 27th of August, 1872, said Cornell paid to the defendant, sheriff, as aforesaid, the amount required to be collected thereon, together with his fees, and on the same day the defendant returned the execution satisfied, and the execution, with the said return indorsed thereon, was filed in the office of the clerk of Oswego county, where the judgment record was filed.

The sheriff retained in his hands the money so recovered by him,

and did not pay the same to the plaintiff, nor pay it into court; nor does it appear that he ever notified the plaintiff that he had collected the money on the execution.

Without making any demand of the money this action was brought, and the sole defense to the action is the non-demand of the money before suit.

On the trial before the referee, the defendant's counsel moved for a nonsuit, on the ground that a demand of the money was not made before suit. The referee denied the motion, and ordered judgment in favor of the plaintiff for money so as aforesaid received by said sheriff, with interest thereon.

And from said judgment the defendant appeals.

*F. L. Westbrook and C. Whitney*, for appellant.

*E. S. Pardee*, for respondent.

MULLIN, P. J. In *Brewster v. Van Ness*, 18 Johns. 133, the plaintiff moved for an attachment against the then late sheriff of Saratoga, for not paying over money collected by him on a *fi. fa.*

The counsel for the sheriff opposed the motion, on the ground that the plaintiff in the execution had not demanded the money.

The attachment was granted. The court say the sheriff was bound either to pay over the money to the plaintiff without any previous demand upon him for that purpose, or to have paid it into court.

In *Dygert v. Crane*, 1 Wend. 534, the declaration was against the defendant, as sheriff of Herkimer, for moneys collected by him on a *fi. fa.* on a judgment in favor of the plaintiff against Sprague and Dunn.

The defendant pleaded that after suit was brought he paid the money into court in obedience to a rule of court, entered by the plaintiff, requiring him to return said *fi. fa.*, and that the plaintiff accepted and received said money. The plaintiff replied, denying that he received the money, and the defendant demurred to the reply. Among other grounds taken by counsel in support of the demurrer was, that no demand for the money before suit was averred in the declaration.

In answer to this proposition, the court say that *Brewster v. Van Ness*, *supra*, disposes of the objection that no demand was made, and they repeat the decision in that case that a demand before suit is not necessary, in order to maintain an action against a sheriff.

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The same proposition is laid down in the same case between the same parties in *Crane v. Dygert*, 4 Wend. 678, and again in *Lillis v. Hoyt*, 5 Hill, 398. In *Paige v. Willett*, 38 N. Y. 28, the court of appeals recognized the same rule. 2 Phil. Ev. 390, and cases cited. We have no right to disregard the law as thus settled, and we must follow it, however numerous or respectable the decisions in the courts of other States may be.

It is urged that the change made by the Code in the form of the execution has changed the law, and that a demand before suit is now necessary, although it might not have been before the Code.

By the *fi. fa.*, under the former practice, the sheriff was commanded to have those moneys before our justices of our supreme court to render unto said plaintiff for the debt, etc. This clause of the writ was not prescribed by any statute, but was inserted, I suppose, by the court; at all events, it was a part of the writ from the earliest time.

Section 289 of the Code directs that certain matters shall be stated in the execution, and § 290 requires it to be returnable within sixty days after its receipt by the officer to the clerk with whom the record of judgment is filed.

There is nothing in either of these sections that is inconsistent with the insertion of the clause above, copied from the common-law *fi. fa.*; and by § 291, it is provided that the existing provisions of law, not in conflict with the chapter of the Code, of which said section is part, relating to executions and their incidents, etc., the powers and rights of officers to enforce those duties, etc., shall apply to executions prescribed by the chapter.

By the phrase, "existing provisions of law," is meant the law as established by the courts, as well as by the legislature, so that the *fi. fa.* provided by the Code might very properly have contained the clause in question, as it was in no respect inconsistent with the provisions of the Code. Indeed, the duty of the sheriff was, and still is, to return the writ and to pay the money into court when collected, and, if not done, he may be proceeded against by attachment or action. The Code has not changed the law as to the duty of the sheriff, and we must, therefore, hold that a demand before suit was not necessary to entitle the plaintiff to maintain the action.

The judgment must be affirmed.

*Judgment affirmed.*

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Swift v. Massachusetts Mutual Life Insurance Co.

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SWIFT, appellant, v. MASSACHUSETTS MUTUAL LIFE INSURANCE  
COMPANY.

*Life insurance—representations in application for policy—question of fact—  
construction of language in application—evidence—declarations of insured.*

In an application by plaintiff for insurance on the life of her husband, she stated that he was in good health, and usually had good health, that she had not concealed any material fact in relation to his health. To a question whether his parents, brother or sister had been afflicted with scrofulous disease, she answered no. To another question she answered that his mother died of scrofula. She further stated that one of his brothers died of an unknown disease, and one of his sisters of disease of the blood. She was not asked if her husband ever had scrofula. The insured person told the examining physician of the company that his mother died of scrofula, and in reply to a question said he never had any of that disease that he was aware of. He died about nine months after the issue of the policy of an abscess caused by scrofula. Evidence was given tending to show that the insured had, on several occasions some years previous to insuring, been in feeble health. Other evidence showed that, with one or two exceptions, his general health had always been good, and had been especially so, with the exception of a slight lameness, for about four years immediately preceding the issue of the policy. *Held* (1), that the question whether plaintiff and the insured misrepresented the true condition of the health of the insured was one of fact for the jury. *Held*, also (2), that the statement that the parents, brothers or sisters of the insured had not been afflicted with scrofulous disease, taken in connection with the statement that his mother died of scrofula, and his sister of disease of the blood, was not untrue, in such a way as to avoid the policy.

At the time the insured was examined he had an abscess. *Held*, that it was for the jury to determine whether he acted in good faith in the representation that he had no symptoms of scrofula that he was aware of.

It was in evidence that the word "unknown" disease was inserted in the application by defendant's agent, in lieu of the statement actually made, that the party did not know of what disease the brother died. *Held*, that it was for the jury to determine what construction should be put upon the word "unknown," whether as referring to the knowledge of the party, or of everybody.

Statements made by the insured to others than the insurance company and the physician in relation to his health, *held* inadmissible.

APPEAL from a judgment of nonsuit ordered at the Genesee circuit.

On the 25th of August, 1870, the defendant issued a policy insuring the life of William P. Swift, to the plaintiff, who was his wife,

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in the sum of \$3,000. The premium was paid on said policy until his death, in May, 1871.

Proof of the death was duly made by the plaintiff, but the defendant refused to pay, on the ground that there had been false representations made, as to the health and condition of said Swift, and matters material to the risk had been concealed from it, by reason whereof the policy became void.

The cause was tried at a circuit court held in Genesee county, and the plaintiff was nonsuited. From that judgment she appealed. The allegations of the complaint being admitted by the answer, the defendant was permitted to open the case.

The defendant gave in evidence a paper, called a declaration, signed by the plaintiff, being a statement of her desire to insure the life of her husband, and that he was 30 years of age, and was in good health, and did usually enjoy good health; and that the answers to the interrogatories annexed to said declaration were true, and that she had not concealed or withheld any material fact in relation to his health, habits of life or condition, which might render an assurance on his life more than usually hazardous, or with which the directors ought to be made acquainted, and she declared that her answers should be the basis, and form part of the contract or policy with said company, and she warranted such answers to be true, and, if not true, she agreed that the policy should be void.

The plaintiff was asked if her husband ever had either of 20 diseases enumerated in the questions, of which scrofula was not one, and she answered in the negative.

She was asked whether the parents, brothers or sisters of her husband had been afflicted with insanity, or with pulmonary, scrofulous or any constitutional disease, and she answered no.

She was asked if his parents were dead, and she answered that his mother died at the age of forty, of *scrofula*.

She was asked how many brothers her husband had, she answered three, and that they had died, one at the age of 18, one at 19, and one at 26. The one who died at the age of 19, died of an unknown disease, the other two died of wounds received in the army. She was asked how many sisters he had, how many were dead, and the causes of their death. She answered that he had two sisters, one living, aged 41, the other died at the age of 14, of disease of the blood.

The defendant proved by several witnesses that in 1861, the

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deceased entered the army as a soldier, and was then feeble, but was not in the hospital ; after he left the army he was well a good deal of the time, and part of the time unwell. He was lame from a sore in the groin, in 1869, for several weeks. In the spring of 1870 he was unwell, and some of the time lame. In 1869, he was confined to his bed a good deal of the time for two or three months. The sore in the groin healed up, but often would break out again.

The brother of Swift, aged 19, died when he, Swift, was a lad, of scrofula; it settled in the knee the leg had to be amputated. It broke out again and killed him. The sister who died had swellings in her throat that were occasioned by what was called the king's evil; she died of scrofula. Swift's mother died of scrofula. She suffered from it a long time before her death.

In February, before Swift died, he was examined by a physician who found him sick, in a low condition, had an abscess in the back which was opened, and matter discharged from it. In or about March, one of his lungs was found to be diseased, an abscess had formed in the right lung, it burst and caused his death, and scrofula was the indirect cause of his death.

One of the witnesses at the trial, a physician, testified that it was important for the insurer to be informed that Swift's mother, and brother, and sister died of scrofula, and if he was himself scrofulous, it would furnish an objection to insuring him. If a doctor was told that an applicant for insurance was scrofulous and had an abscess, he would conclude it was scrofula. Scrofula is a hereditary disease. If informed that the mother was scrofulous, he would not deem it necessary to inquire as to the applicant's brother and sisters.

The plaintiff was herself sworn, and testified that her husband was repeatedly urged to insure in defendant's company by its agent. The agent read the questions and the husband answered them, and the agent wrote them down. In answer to the question as to the disease the brother died of, when about nineteen years of age, the husband answered he did not know, and the agent said he would write it down "unknown," and he did so. Plaintiff did not know Swift until after he left the army. They were married soon after, and lived together till his death; his health was good up to his last sickness. He was lame awhile, in 1869 — from four to six weeks — attended, during that time, to his business every day. He recovered entirely from his lameness, and was not again lame until



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his last sickness ; never knew that he had any scrofulous affection. Witnesses, who served in the army with him, testified, that during the time he was in the army his health was good.

Another witness testified, that his health was good after he returned from the army. Saw him often ; visited at his house, and Swift at his ; Swift worked on the farm for the witness.

The physician who examined him, prior to issuing the policy, gave a certificate to the defendant as to the physical condition of Swift, and the propriety of insuring his life. He pronounced him to be a healthy man, free from any predisposition, either hereditary or acquired, to any constitutional disease.

The same physician was examined as a witness on the part of the defendant, and testified, that having seen in the answers of Swift to the interrogatories put by the company to him, that his mother died of scrofula, he asked Swift if he ever had any of that disease, and he said no ; and upon that answer witness based his answer to the question put to him as examining physician, whether there was any apparent predisposition to that disease. If he (Swift) had said that he had scrofula, it appearing that his mother died of scrofula, he should not have recommended him for insurance.

On his cross-examination, he testified that he had examined Swift two years before, with a view to insurance in another company ; the examination was thorough, and he accepted him as a proper subject for life insurance. Found no indications about Swift, that would render him an improper subject for insurance.

On the trial the defendant offered to prove the statements of Swift on repeated occasions as to his bad state of health, and the disease with which he was troubled. The plaintiff's counsel objected to the evidence. The objection was overruled and plaintiff's counsel excepted.

The defendants moved for a nonsuit, on the ground that the plaintiff had been guilty of misrepresentation and concealment, in the application for insurance, in regard to the health of Swift, and as to whether he had scrofula or scrofulous affections, and as to his having any sickness or disease ; also, because Swift made misrepresentations as to the disease or cause of the death of his brother, and as to the taint of scrofula existing in the family.

The plaintiff's counsel insisted that the questions were questions of fact and not of law, and asked that they be submitted to the jury. The request was refused, and plaintiff's counsel excepted.

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The court then held, as matter of law, that the policy was void from the time it was issued, and ordered a nonsuit.

*Peck & Bowen*, for appellant, cited *Rawls v. American Life Ins. Co.*, 36 Barb. 357; *S. C.*, 27 N. Y. 282; *Bliss on Life Ins.*, § 384; *Jefferson Ins. Co. v. Cothreal*, 27 Wend. 79; *Mallory v. Travelers' Ins. Co.*, 1 Ins. Law Jour. 843; *Sheldon v. Atlantic Ins. Co.*, 27 N. Y. 460; *Stone v. Flower*, 47 id. 566.

*George Bliss*, for respondent. If any untrue statement was made in the application the policy was void, even though not made intentionally or relating to a material fact, or known to the insured to be untrue. *Smith v. Aetna Life Ins. Co.*, 49 N. Y. 211; *Kelsey v. Univ. Life Ins. Co.*, 35 Conn. 225; *Campbell v. N. E. Mut. Life Ins. Co.*, 98 Mass. 381; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 163; *Mut. Benef. Life Ins. Co. v. Miller*, 2 Ins. Law Jour. 101; *Swick v. Home Life Ins. Co.*, id. 415; *Anderson v. Fitzgerald*, Law Rep., 4 H. L. 484; *Duckett v. Williams*, 2 Crompt. & M. 348. The concealment made by the insured in reference to his health was fatal to a recovery on the policy. *Valton v. Nat. Fund Life Assur. Co.*, 20 N. Y. 32; *Wainwright v. Bland*, 1 Mer. & R. 481; *Von Lindenau v. Desborough*, 3 C. & P. 353; *Vose v. Eagle L. & H. Ins. Co.*, 6 Cush. 42; *Cazenove v. Brit. Eq. Assur. Co.*, 6 C. B. N. S. 437; *Perrins v. M. & G. Trav. Ins. Co.*, 2 El. & El. 317; *In re Gen. Prov. Life Assur. Co.*, 18 W. R. 396.

MULLIN, P. J. The question whether the plaintiff misrepresented the state of health of her husband in an application for an insurance on his life, was one of fact, and should have been submitted to the jury.

Proof was given by the defendant tending to prove that he was in feeble health before entering and while in the army, and on two occasions after leaving it. But the plaintiff testified that she became acquainted with him in 1866, when they were married, and that, with the exception of lameness on two occasions, he enjoyed good health until his last sickness. His father testified to his good health up to the time of going into the army — with one exception, when it was found his lungs were affected — and to his good health subsequent to his return from the army. Two witnesses testified that he enjoyed good health during the time he was in the army.

If a disputed question of fact could be raised upon a trial, it

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surely was raised in this case. The question was one of fact, and should have been submitted to the jury.

The defendant charges the plaintiff with both misrepresentation and concealment as to scrofula being the cause of the death of Swift's brother and sister.

The question put to the plaintiff was this: Have the parents, brothers or sisters of the party been afflicted with insanity, or with pulmonary, scrofulous, or any constitutional disease? Her answer was no. If this answer was proved to be untrue, the plaintiff was rightly nonsuited.

In considering the question of the truth of this particular answer, plaintiff's answers to other questions upon the same subject must be borne in mind. For if the answers to other questions informed defendant truly of the matters inquired into, the answer in question cannot be said to be untrue so as to avoid the policy. The question was put to the plaintiff to enable the company to know whether insanity, pulmonary, scrofulous, or other constitutional disease existed in the family of her husband.

If the answers conveyed to them the information that scrofula was a disease existing in the family, they had the information they needed to enable them to determine the propriety of taking the risk.

Plaintiff, in answer to a subsequent question, told them that her husband's mother died of scrofula. And in answer to another question she told them that her husband's sister died of disease of the blood.

It seems to me that when the fact was disclosed that the mother died of scrofula, and one of her daughters of disease of the blood, the existence of scrofula in the family was as clearly stated as if they had been told it was hereditary.

The question was not put to the plaintiff whether her husband had been afflicted with scrofula, and its existence in his system might well be inferred from the fate of his mother and sister.

But it was possible that the mother might be scrofulous, and yet a child be so little affected with it as not to exhibit any symptoms of it. But the examining surgeon says that, seeing by plaintiff's answers that his mother died of scrofula, he inquired of Swift whether he had ever had the disease or any symptoms of it that he was aware of, and he said no. Because of this answer the doctor omitted to advise the company not to accept the risk.

The answer of Swift to the doctor was not a warranty, but it was

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a representation as to a most material fact, and it was untrue, if it is to be taken as a denial that he had had any symptoms of scrofula. The abscess in the groin which he had before the application for insurance was evidence of scrofula in his system.

But the answer was not an unqualified assertion that he had not had any symptoms of scrofula, but that "he had not had '*as he was aware of*.'" He was, of course, aware of the existence of the abscess, but he might not know that it was any evidence of scrofula. That was a question of skill which a non-professional man might not be able to answer.

It was for the jury to say whether Swift was aware that he was afflicted with scrofula, or whether he was acting in good faith when he told the doctor that he had had no symptoms of scrofula that he was aware of.

It is said that the answer to the question, as to the disease of which his brother died was "unknown," was untrue. It is untrue if plaintiff is to be understood by the answer as saying that no person, not even a physician, knew of the cause of his death.

The plaintiff's counsel says, that the meaning of the witness was that it was unknown to him, and that the use of the phrase "*unknown*" was the work of defendant's agent, who, as appears by the evidence of the plaintiff, used the word in lieu of the language used by the witness, that he did not know of what disease his brother died. The answer would bear either construction, and I think the jury should have been permitted to say which was the correct one.

The statement of Swift as to his health and the cause of his lameness at any time, except to the defendants or the physician, were incompetent and ought to have been excluded, and, in the abstract of the evidence I have given, I have excluded them. They were admissible for no purpose whatever, and their admission must reverse the judgment and require a new trial unless there is clear, uncontradicted evidence of some breach of a warranty that must be fatal to a recovery.

While the question is not altogether free from doubt as to whether a breach of warranty is not proved, yet there are so many questions which should have been submitted to a jury, and they are so connected with those which tend to prove a breach of warranty, that the case should go back for another trial.

Judgment is reversed and a new trial ordered, costs to abide event.

*Judgment accordingly.*

## THRASHER v. BENTLEY, appellant.

*Vendor and purchaser — rescission of sale — purchase-money — use and occupation — Laws 1860, chap. 348 — Bankrupt law.*

Plaintiff agreed, by parol, to purchase a house from defendant, took possession of the same, and paid part of the purchase-money. Afterward the sale was rescinded by mutual agreement, and defendant took possession of the premises. *Held*, that plaintiff was entitled to recover the purchase-money paid, and defendant to recover for the use and occupation of the premises by plaintiff.

The statute of 1860, (chap. 348), in relation to assignments for the benefit of creditors, is not an insolvent law, and is not interfered with by the bankrupt law.

The collection of assigned choses in action, by the assignee, is not a conversion of them within the meaning of § 3 of the act of 1860.

APPEAL from a judgment against defendant, entered upon the report of a referee.

In July, 1871, Charles M. Syme made a parol agreement with the defendant, Elvira Bentley, to purchase from her a house and lot in Rochester, for \$2,800, and entered into the actual possession of the premises. By the agreement, plaintiff was to pay \$500 down upon the delivery of a deed, in which his wife was to be named as grantee. At the time of making the agreement of sale, the deed, and other necessary papers, were executed, but were not delivered, the delivery being delayed until Syme should pay the \$500. Between June and November, 1871, Syme sold and delivered groceries, at various times, to defendant, which were charged to her account, upon an agreement between the parties, that the price should be applied toward the \$500, due from Syme. The aggregate amount, in value, of such groceries, was \$235.26.

In the fall of 1871, Syme's wife became insane, and was taken to a lunatic asylum. Subsequently, Syme told defendant that they could not keep or pay for the house and lot, and that she would have to take it back, and about the 1st of December, 1871, defendant took possession of such house, and afterward controlled and rented it.

In November, 1871, Syme made an assignment of his property for the benefit of his creditors to the plaintiff, Fletcher M. Thrasher, who brought this action to recover the value of the groceries sold

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to defendant. Defendant, in her answer, set up several counter-claims, among which were an account for goods sold and moneys lent, a claim for goods sold by one Peck to Syme, and assigned to defendant, and a claim of \$75 for use and occupation of the premises.

The referee allowed plaintiff's claim, and \$19.50 upon defendant's counter-claim for goods sold Syme, and \$76 for the use and occupation of the premises in question, and ordered judgment in favor of plaintiff, for \$151.96, principal and interest.

*J. M. Dunning*, for appellant.

*Goddard & Cheney*, for respondent.

MULLIN, P. J. The only question of any importance in this case is whether there was a rescission of the contract for the purchase and sale of the house and lot so as to entitle the purchaser to recover back so much of the purchase-money as he had paid. In considering the question, Syme must be treated as the purchaser, notwithstanding the title was to be conveyed to his wife. Neither party had by the contract the right to rescind, and if there was a rescission, it was by mutual agreement of the parties. It was proved on the trial, and the referee finds that Syme told the defendant his wife was in the lunatic asylum, and the purchase-money of the land would not be paid, and he must give it up and defendant must take it back. Syme thereupon surrendered possession, and defendant entered upon and leased the premises to another person, and has ever since retained control of the same.

When a contract for the sale of real estate is rescinded by mutual consent, the purchaser is entitled to recover whatever he has paid toward the purchase-money. 2 Hilliard on Vendors, 65. But such a recovery is not allowed in any other case, except when the vendor has been guilty of fraud in the sale, or is unable or refuses to perform the contract. 2 Hilliard on Vendors, 65; 1 id. 302.

The contract being mutually rescinded, the vendor was entitled to recover for the use and occupation of the premises by the purchaser. 1 Hilliard on Vendors, 302. Setting up a claim for use and occupation, and a recovery therefor, is conclusive evidence of her consent to rescission of the contract.

The declarations of Syme, while he was in possession of the

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premises, were offered in evidence and rejected. The object of the defendant was to prove that he, Syme, claimed to control the premises, and to treat them as his own. If the fact was one of any importance in the case, it was substantially assumed by the referee. They were totally immaterial, and their rejection worked no prejudice to the defendant.

The law of 1860, chap. 348, regulating the manner of executing assignments by debtors for the benefit of creditors is not an insolvent law, and is not interfered with by the bankrupt law. It is quite possible that the assignments contemplated by that law may not be permitted by the bankrupt law, as to which I express no opinion. If they are not, the law is suspended in its operation, and will only be revived when the bankrupt law is repealed. The assignment to the plaintiff by Syme is not rendered void, because the assignee did not file a bond in exact conformity with the provisions of the law. The assignee has thirty days from the date of the assignment in which to file the bond. During the thirty days the title must be in the assignee, so that the legislature contemplated that the title should pass. But until a proper bond was filed the assignee had no authority to sell, dispose of, or convert for the purposes of the trust, any of the assigned property. Laws of 1860, chap. 348, § 3.

Collecting the assigned choses in action was not a conversion of them, within the meaning of this section. The other questions presented by the appellant's points do not require any consideration.

The judgment must be affirmed.

*Judgment affirmed.*

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GOODALE v. WALSH, appellant.

*Mechanic's lien — extent of.*

Respondent, under an agreement with the contractor, did work, by the day upon appellant's building, from January 22d to March 5th, and again from April 8th to April 19th. He filed a mechanics' lien, under Laws 1854, chap. 402, for such labor, on May 11th, by which he claimed a lien for wages for the whole time he worked. *Held* (following *Spencer v. Barnett*, 35 N. Y. 94), that he was entitled to a lien for only the work done during the thirty days next preceding the time of filing his notice of lien.

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APPEAL from a judgment, entered upon the report of a referee, in a proceeding to foreclose a mechanics' lien. The facts appear in the opinion.

*D. O'Brien*, for appellant.

*H. S. Gipson & Levi H. Brown*, for respondent.

MULLIN, P. J. The only question in this case is, whether a mechanic who performs labor in erecting a building, can obtain a lien, under chap. 402, Laws of 1854, for such labor, for a longer period than thirty days, when there is an interval of several days between the times of performing the labor.

The plaintiff was employed by the day, and began work on the building, in course of erection for the defendant, under an agreement with one Tomplin, the contractor for doing the work on the building, on the 22d of January, 1872, and continued his work until the 5th of March following, having worked in the mean time thirty-four days. He then ceased work. He began again on the 8th of April, and continued until the 19th of that month, having worked in the mean time ten and a half days. His notice of lien was filed on the 11th of May, 1872, in and by which he claimed a lien for his wages for forty-four and a half days.

The referee held that the plaintiff was entitled to a lien for the whole time, and ordered judgment for his wages for such time, with costs, and from that judgment the defendant appeals.

In *Spencer v. Barnett*, 35 N. Y. 94, the court of appeals held that to entitle a party furnishing material for constructing a building in Kings county, to a lien on the premises for the price of the material furnished, he must file his notice of lien in the clerk's office of that county, within sixty days after the delivery of the same.

The lien law in force when the question arose in the case cited is substantially like the act of 1854, in so far as the time is limited within which the notice of lien must be filed after performing the work on furnishing the materials, and the same rules of construction must apply to each. The reasons which induced the legislature to limit the time for filing the notice to thirty or sixty days must have been the same under the general law as under the Kings county law.

The head note of *Spencer v. Barnett*, which I have copied above,



is a mere repetition of the provision of the statute in force in Kings. We must look into the facts in that case, in order to ascertain what was actually decided.

The claim in that case was for a lien for materials, which the act required to be filed in sixty days after delivery.

All the materials were furnished before the 10th of January, 1857, except a very small amount delivered on three days in March and April; none were delivered between January 10th and March 12th, a period of sixty days. The notice of lien was filed the 9th of May, 1857.

The judge by whom the case was tried allowed the lien for the materials furnished, as well for those furnished before the 10th of January as after that date.

The court of appeals reversed the judgment, holding that the plaintiff was not entitled to lien for materials furnished beyond sixty days from the 9th of May, 1857.

In that case the materials were all furnished under one and the same contract, but that consideration does not seem to have induced the court to change or modify its construction of the statute. In the case before us, the plaintiff was employed by the day, and from day to day, and has not the benefit of a single contract under which the labor was performed, if that consideration would affect the construction of the statute. It is impossible to draw any distinction between the case cited and the one in hand, we must follow it and reverse the judgment.

By section sixteen of the act of 1854, the plaintiff was entitled to costs. By the fifteenth section the plaintiff is entitled to costs to be paid out of the fund in the hands of the owner when he has funds belonging to the contractor. By the sixteenth section the successful party is entitled to costs, in the same cases as in actions on contract.

There is some reason for giving the laborer or person furnishing materials costs out of the funds of the contractor when the owner has funds in hand belonging to him, but I am unable to see the justice of charging the owner with costs, when no money is due, but will be due when the contract is completed.

The provision of the act of 1873, leaving the costs in the discretion of the court, is entirely just.

I am unable to understand why the party performing labor or furnishing materials is not entitled to a lien upon the money to be

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paid for extra work, if the extra work is provided for by a contract between the parties. Yet it has been so held in several cases in the New York common pleas. In these cases, it is probable the extra work was not done pursuant to any contract.

In *Haswell v. Goodchild*, 12 Wend. 373, the supreme court would seem to hold that the plaintiff was entitled to a lien on money payable for extra work. I have been unable to find any case in the court of appeals upon the subject.

The lien was filed the 11th of May; the plaintiff is, therefore, entitled to recover for labor after the 11th of April. As ten and a half days' labor was performed between the 8th and 19th of April, plaintiff can only be allowed for seven and a half days.

The judgment must be modified by reducing it to \$18.32, that being the amount of seven and a half days' labor, at \$2.25 per day, and interest on that sum to the date of the report.

*The judgment, as modified, affirmed.*

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NICHOLS, administrator, etc., appellant, v. TIFT.

*Contract — construction of.*

B brought a creditors' suit to discover money or property of P. Defendant, against whom an action had been brought by the committee of P., to set aside the conveyance of certain property previously owned by P., in settlement of such action, agreed that if B. should discover in his creditors' suit any money or property of P., and should recover final judgment, that such money or property be applied in satisfaction of a judgment held by B, defendant would satisfy such judgment "to the extent of the money or property so adjudged to be applicable to the payment" of said judgment. Property was discovered of the value of \$11,694. Out of this the court deducted for costs and administrators' fees and commission, \$3,119.96, leaving a balance of \$8,574.42, which last-named sum it found and adjudged was applicable in reduction of the judgment of B.

In an action upon the agreement of defendant, *held*, that defendant was liable for only the said sum of \$8,574.42, and was not liable for the whole sum discovered.

APPEAL by the plaintiff from a judgment of the special term of the superior court of Buffalo, entered upon the decision of that court. The action and appeal were removed to this court under a

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certificate, pursuant to Laws of 1873, chap. 239, that there were no two judges of the superior court qualified to act in said appeal. The necessary facts appear in the opinion.

*Asher P. Nichols*, appellant in person.

*John Ganson*, for respondent.

MULLIN, P. J. In 1861, one John Carter Brown held a bond and a mortgage on lands in Erie county, made by Aaron D. Patchin. An action to foreclose said mortgage was brought against said Patchin and others, and such proceedings were had in said action that a judgment of foreclosure and sale was entered. The premises embraced in said mortgage were sold by virtue of said judgment for the sum of \$2,000, and a judgment for a deficiency for \$10,887.02, was entered against said Patchin. In 1862, said Patchin, being largely indebted to the Chautauqua County Bank, pledged to it as security divers stocks and choses in action. In July of 1862, said debt being unpaid, the trustees of said bank at the request, and by the authority of said Patchin's duly authorized agent, sold at private sale said stocks, etc., to the defendant, Tift.

In October of the same year, Patchin, by his agent, sold to Tift 1416 shares of the capital stock of the Buffalo, N. Y. & Erie R. R. Co., of the nominal value of \$100 each, for \$4,000. John Carter Brown brought an action in the nature of a creditor's bill against Patchin to collect out of his choses in action, etc., the deficiency arising from the foreclosure sale above mentioned.

In that action, such proceedings were had that it was adjudged that said Brown had obtained an equitable lien on certain bonds to the amount of..... \$11,694 38

Out of which there was allowed to Patchin's administrators for commissions..... 1,190 34

\$10,504 07

And there was charged and paid out of said fund for costs, etc..... 1,929 65

Leaving to apply on the judgment..... \$8,574 42

Patchin became insane, and his wife was appointed committee of his person and estate.

After such appointment she commenced an action against the defendant, Tift, to set aside the sale of the 1416 shares of railroad stock. This suit, and the creditor's suit of Brown, were pending at the same time.

A settlement was concluded between Mrs. Patchin and Tift, subject to the approval of the court by which she was appointed committee, as stated in the covenant on which the action is brought. The settlement was in substance that, if Brown should discover in his creditor's suit any money or property of said Patchin, and should recover final judgment in the said action, that such moneys or property should be applied in satisfaction of the judgment for the deficiency in the foreclosure action, he, said Tift, would satisfy such judgment "to the extent of the money or property so adjudged to be applicable to the payment" of said deficiency judgment.

The judge who tried this cause in the superior court in his findings of fact says that a judgment was entered in the creditor's suit of *Brown v. Patchin*, that Brown obtained a lien on eight second mortgage bonds of \$1,000 each, and on \$2,128 interest accrued thereon, which lien was a valid and subsisting one against said bonds, and he was entitled to have the proceeds thereof, *after deducting the fees and commissions of the plaintiff in this action as administrator, and after paying the costs and disbursements of the respective parties to said action* applied on his judgment.

The whole amount discovered in the creditor's suit was \$11,694; out of this the court deducted \$3,119.96 for costs, etc., and found and adjudged that there was applicable in reduction of the Brown judgment the sum of \$8,574.42, being the amount remaining of the fund on which Brown had the lien, after deducting costs, etc.

The plaintiff, as administrator of Patchin, brings this action to recover of defendant on the covenant executed by him and delivered to Mrs. Patchin, in pursuance of the settlement of the suit brought against the defendant to set aside the sale of the railroad stock, the sum of \$11,694.38 being the amount realized from the choses in action on which it was adjudged Brown had obtained a lien.

The superior court held and decided that plaintiff could recover of the defendant only the sum of \$8,574.42, being the amount remaining of the avails of the securities, after deducting costs, etc., and it is this judgment that plaintiff seeks to review in this court to which the suit has been transferred.

Brown discovered in his creditor's suit property on which he

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obtained a lien to the amount of \$11,694.38, and the whole or so much as was necessary to satisfy his judgment was applicable thereto. As between him and his debtor only so much would be applied in reduction of this deficiency judgment as remained of said property after paying such charges as the court or the law should require to be paid for costs and charges in the creditor's suit. But as between Brown and any person covenanting to pay the value of any property he might discover in his creditor's suit, the value of the whole property discovered would be the measure of damages.

The defendant's covenant is not that he will pay the value or amount of all such property as Brown might discover in his said action, but that if he, Brown, discovers property and shall recover final judgment in his said action that such moneys or property be applied in satisfaction of the deficiency judgment, he (defendant) would satisfy such final judgment to the extent of the money or property so adjudged to be applicable to the payment of said deficiency judgment.

We must ascertain the extent of defendant's liability, not from the amount of the property Brown should discover in the action, but from the judgment of the court declaring the amount that should be applied on the judgment and in full or partial satisfaction thereof.

The court has adjudged that \$8,574.42 of the property discovered should be applied in satisfaction of the deficiency judgment; such a judgment must have been recovered before any liability of the defendant could be said to arise, and being recovered the defendant's liability for that sum and interest is established.

The judgment of the superior court is in strict conformity to the term of the covenant, and it must be affirmed.

*Judgment affirmed.*

MAPES, executrix, *et al.* v. SNYDER *et al.*, appellants.

*Practice—marriage of female plaintiff pending suit—abatement—fraudulent conveyance—rights of grantee—consideration.*

Plaintiff, a woman, commenced an action and afterward married. The action was referred after issue was joined, and in the order of reference it was provided that the changed name of the plaintiff might be entered, without motion. At the trial before the referee, the defendant objected to proceeding, on the ground of plaintiff's marriage. The order of reference was produced and the proceedings continued in the cause, as originally entitled. Subsequently, an *ex parte* order was entered by the clerk, under the direction of plaintiff's attorney, substituting plaintiff's name after for her name before marriage. *Held*, that under section 121 of the Code, there was no abatement of the action by reason of marriage of the plaintiff, until it should be so ordered by the court, and no such order having been obtained the proceedings after the marriage were regular.

The defendants, in order to defraud creditors by voluntary deed, conveyed certain real estate to plaintiffs' intestate. Afterward they asked the intestate to reconvey the property to them, which he refused to do unless a mortgage for \$1,200 was executed back to him. The mortgage was executed and he reconveyed the property. *Held*, that the fraudulent conveyance could not be impeached by defendants; the intestate was entitled to require the mortgage as a condition of reconveyance, and the consideration of the mortgage was valid.

APPEAL from a judgment in favor of plaintiffs, entered upon the report of a referee in an action to foreclose a mortgage. The facts appear sufficiently in the opinion.

*S. R. Ten Eyck*, for appellant.

*Franklin & Morris*, for respondent.

MULLIN, P. J. This action was brought to foreclose a mortgage made by the defendant, Hamilton J. Snyder, to Charles W. Snyder, bearing date the 24th of February, 1852, to secure the payment of the sum of \$1,200 in twelve equal annual payments, with interest from the 1st of April, 1852. The mortgage was duly acknowledged and recorded.

It is recited in the mortgage that it was given for one-half of the purchase price of the premises described in it. Sardineacette Snyder,

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wife of the mortgagor, was made a party defendant in the action. She and her husband appeared and put in answers denying the allegations of the complaint, and alleging that the mortgage was not given to secure any part of the purchase-money of the premises described in it, but, on the contrary, was given without consideration. That when it was given the defendant, Hamilton J., was not indebted to the mortgagee, but the latter was indebted to him.

In a third answer it was alleged that in the year 1858, the mortgagee, in consideration of his indebtedness to Hamilton and of his knowledge that it was without consideration, agreed to cancel and discharge the same.

In a fourth answer it was alleged that, in consideration of the release by Hamilton of an indebtedness of the mortgagee to him, the latter agreed to release and discharge said mortgage and the indebtedness of each to the other was agreed to be discharged.

Charles W. Snyder died, leaving a last will, in and by which he appointed his wife Emeline executrix thereof. The will was duly proved and the executrix took upon herself the duties of said trust.

The mortgage in question was found among the assets of the deceased, and she proceeded to foreclose the same.

The action for that purpose was commenced in the winter of 1868. After its commencement, and prior to the 27th of September, 1869, the executrix inter-married with one Mapes. By an order of the special term, made on the last-mentioned day, the issues joined in said cause were referred for trial to John E. Seeley, Esq., and in the same order it was provided that the husband of the said executrix might be made a party, if required so to be, by the practice of the court, without motion, and the real name of the executrix entered, if required.

On the 21st of June, 1870, plaintiff's attorney directed the clerk of Seneca county, in which the place of trial was, to enter an order *ex parte* that the name of Emeline Mapes should thereafter be substituted in this action for Emeline Snyder, and the order was entered accordingly.

The trial commenced before the referee, on the 2d of June, 1870. Before any evidence was given on said trial defendant's counsel objected to proceeding therein, because since the action was commenced the plaintiff had inter-married with one Mapes, and the action had not been revived or continued in her present name. The plaintiff's counsel then produced the order of reference above men-

tioned, and the referee overruled the objection of the defendant's counsel and proceeded to try the cause, and swore the witnesses in the cause as originally entitled.

The plaintiff put in evidence the mortgage described in the complaint, on which there was indorsed a payment of \$184 as of the 20th of April, 1853, and rested.

The defendant, Hamilton J. Snyder, was then sworn as a witness, and was asked the following questions, viz.:

What was the the mortgage given for?

Was it given to secure the purchase-money of the land described in it?

How came the words "that it was given to secure the purchase-money of the premises" to be inserted in it?

Was there any consideration for the mortgage?

Were you indebted to the mortgagee at the time of the execution of the mortgage in any sum whatever?

Was not the mortgagee, in fact, indebted to you at the time of executing this mortgage in the sum of \$600?

These questions were severally objected to by plaintiff's counsel, on the grounds, among others, that the witness was incompetent to testify, as the questions called for transactions with the mortgagee who was deceased. The objection was sustained and the questions were not allowed to be put. The defendant's counsel then offered to put the same questions to the witness in behalf of his wife, the other defendant. They were again objected to and rejected.

The parties then gave evidence tending to prove, and the referee finds did prove, that in December, 1839, the defendant, Hamilton J. Snyder, being very much embarrassed by debts, some of which were in judgment, and fearing that his creditors might seize and appropriate to the payment of their debts the interest his wife had in a farm of land which had descended to her from her father, they united in a conveyance of the interest of the wife in said land to the plaintiff's testator, for which conveyance no consideration whatever was paid by said grantee, but it was made for the sole purpose of hindering, delaying and defrauding the creditors of said Hamilton J. Subsequently Sardineacette, wife of said Hamilton, applied to said Charles to convey to her said land; but he declined to do so, unless she and her husband would give him a mortgage for \$1,200.

The mortgage in question was given in pursuance of such demand, and upon no other consideration, and he (Charles) thereupon con-



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veyed to the wife of Hamilton the share of the farm conveyed as above mentioned to him by Hamilton and his wife.

The premises described in the mortgage for \$1,200 were purchased and paid for by Hamilton J. Snyder, but were conveyed to him and said Charles jointly by the requirement of the latter, who paid nothing for the interest so conveyed.

The premises so conveyed were paid for by the conveyance to the grantors of a house and lot that Hamilton J. owned and conveyed to Charles, for the purpose of hindering, delaying and defrauding his creditors. Charles, at the request of Hamilton, conveyed the house and lot in payment of the premises described in the mortgage, but before he would do so, he required the conveyance of said premises to be made to himself and Hamilton jointly, and it was so done.

When the mortgage in question was given, and as a part of the transaction Hamilton J. gave to Charles a receipt, dated February 24, 1852, in full of all demands, accounts and claims he had against him.

The referee further finds, that the mortgage was not given for the purchase-money of the premises therein described.

Judgment of foreclosure was ordered as against Hamilton J., but the complaint was dismissed as to his wife, with costs, and from that judgment Hamilton J. appealed.

The question to be first considered in this case is, whether the referee had any power to proceed and try the cause after the marriage of the plaintiff therein.

By the practice in the court of chancery, before the Code was enacted a suit abated on the marriage of a female plaintiff. To entitle her to proceed in the action it must be revived by a bill of revivor. *Quackenbush v. Leonard*, 10 Paige, 131. If proceedings were had in the cause after the marriage and before the revivor, they were irregular, and would be set aside on motion. 1 Barb. Ch. Pr. 676-7. But such proceedings were not utterly void. Hence the chancellor in the case cited, *supra*, held that if there was a decree in her favor, the defendant was bound by it, and could not afterward urge the objection that the suit had abated by her marriage. In the case cited the court of errors had affirmed a decree of the chancellor in favor of the plaintiff, who had married before the affirmation of the decree, and before the decree was revived, and the chancellor held the decree was not only not void, but that it must be

carried into effect in his court, after the proper parties had been brought in.

Section 121 of the Code provides that at any time after the death, marriage or other disability of the party plaintiff, the court in which the action is pending, upon notice to such persons as it may direct, and upon application of any person aggrieved, may in its discretion order that it be deemed abated, unless the same be continued by the proper parties within a time to be fixed by the court, etc., etc. Under this section there is no abatement by reason of the marriage of the plaintiff, until it is so ordered by the court. In this case no such order has been obtained, and hence the proceedings after the marriage were regular.

The questions put to the witness, Hamilton J. Snyder, as to the consideration, etc., of the mortgage, could not be answered without detailing transactions between him and the plaintiff's testator; and this he could not be permitted to do, under section 399 of the Code. If there were any matters which could be proved in answer to either of said questions, without violating the section referred to, it was the duty of the defendant's counsel to disclose them, so that the party and referee might be able to determine whether they were admissible; not making such disclosure, the questions were properly overruled.

There were several questions put to the witnesses similar to those just considered, which were incompetent on the same grounds.

As Mrs. Snyder has not appealed, the rulings affecting her rights are not before us, and cannot therefore be considered. In one instance, and it may be in several, the referee reserved his decision as to the competency of evidence, and it is incorporated in the case, and we must assume it was received, and the objections to it overruled, and as the objections were made by the plaintiff, she cannot complain of the rulings.

Mrs. Snyder was asked whether she had a conversation with Charles in relation to the partnership between him and her husband, and his being indebted to him, and she was asked to state what the conversation was. The question was objected to on the ground that she was not competent to testify, and because no bill of particulars had been served.

Mrs. Snyder was a competent witness for or against her husband. *Laws of 1867*, chap. 887, § 1; *Wehrkamp v. Willett*, 1 Keyes, 250; *Card v. Card*, 39 N. Y. 317. I am unable to understand the mean-

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ing of the other ground of objection, to wit: That no bill of particulars had been served. The effort of the defendant upon the trial was to prove that there was no pecuniary consideration for the mortgage arising from any indebtedness between the parties thereto. Such evidence was clearly competent, and its competency did not depend in any degree on the delivery or non-delivery of a bill of particulars. But as the referee has found that there was no consideration for the mortgage, it is unnecessary to discuss the question further. The admission of the evidence has done the defendant no harm.

This brings me to the principal question in the case, and that is, whether the mortgage was a valid and available security in the hands of Charles or his executrix, against the defendant Hamilton J. Snyder. The referee finds that the contract of Mrs. Snyder was conveyed to Charles, for the purpose of cheating and defrauding the creditors of her husband. That conveyance was executed in 1839; at that time the husband had a tenancy by the curtesy initiate in the lands of the wife. This estate passed by his deed; the fee which was in the wife passed by the same deed, to which she was a party.

A deed, however fraudulent it may be, is valid as between the parties to it, and it is only the persons it was made to defraud that can assail it and set it aside. A court of equity will not, where the fraudulent purpose is disclosed, give relief to either of the parties to the deed who are implicated in the fraud. 1 Story's Eq. Jur., §§ 298, 299, and notes; *Sweet v. Tinslar*, 52 Barb. 271, and cases cited. It leaves them as it finds them. See same cases.

It follows that neither the defendant nor his wife could have maintained an action to recover back the land belonging to them from Charles or his legal representatives. On the delivery of that conveyance, Charles became owner in fee of their share of the farm described in the deed, and could hold it as against all the world except the creditors of Hamilton. Being owner, he could sell it to Hamilton or his wife upon such terms and conditions as they could agree upon, and he did sell and convey it to the wife for the amount secured by the mortgage. A sale for that sum to any third person would have been valid, and no reason is perceived why it could not be made to the defendants, or either of them.

It was undoubtedly grossly unfair and unjust for him to demand any sum of money for conveying back property transferred to him

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upon the implied, if not the express, assurance that he would discharge himself of the trust whenever requested so to do; but the defendants took the hazard of a breach of faith, and they must submit to it.

The giving of the mortgage was no part of the original fraudulent arrangement, and decreeing foreclosure of it is not carrying that arrangement into effect.

The referee has not found any agreement by the testator founded on a valid consideration to satisfy and discharge said mortgage, nor is there any finding of an accord and satisfaction. This court cannot find facts which the referee has either omitted or refused to find.

To give relief to defendants because the testator admitted that it would be dishonest to enforce the mortgage, and he, for that reason, proceeded to cancel it, would be to give the defendant the benefit of the fraudulent arrangement to which he was a party, and that the court cannot and will not do.

The judgment must be affirmed, with costs.

*Judgment affirmed.*

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PARSONS, appellant, v. COBURN, administratrix, etc.

*Contract for sale of real estate—stipulations as to cutting timber—application of moneys received by vendor.*

Plaintiff and C. made a contract, whereby C. agreed to convey to plaintiff a farm at a specified price. Plaintiff, on his part, agreed to pay such price, and also to cut and deliver to C. all the spruce timber on the farm at a certain price; he also agreed to cut and deliver hemlock logs and peel hemlock bark for C. at certain rates. A portion of the moneys due for such timber and bark was to be applied toward the payment of the purchase-money of the farm, the remainder to be received by plaintiff, in cash. The contract further provided, that until the deed of the farm was delivered, C. should remain in possession, and plaintiff should not cut or sell, except as above stated, any timber standing on the premises. A firm of bridge builders, wishing some timber, applied to plaintiff to sell them some. Plaintiff asked C. to consent to his doing so; C. refused, unless a certain proportion of the price was paid to him, and an agreement of sale was made whereby C. was to receive a share. Under this agreement, C. received from the firm of bridge builders \$431.68.

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*Held*, that in the absence of an express agreement that C. might take the money received by him to his own use, it would be applicable on the contract for the sale of the farm toward the purchase price. The consent, however, of C. would furnish a sufficient consideration for an agreement that he might receive such money to his own benefit.

APPEAL from a judgment entered in favor of defendant, upon the report of a referee directing the complaint to be dismissed. The facts sufficiently appear in the opinion. The action was commenced against Wm. M. Coburn, who died during its pendency, and the administratrix of the deceased was substituted.

*Cornelius E. Stephens*, for appellant.

*George Gilbert & Levi H. Brown*, for respondent.

MULLIN, P. J. On the 23d of November, 1869, the plaintiff and defendant's intestate entered into a contract under their respective hands and seals, whereby the said intestate, William M. Coburn, covenanted and agreed to sell and convey unto the plaintiff, a farm of land, in the town of Croghan, in the county of Lewis, at and for the price of \$2,379.12, payable in three equal annual payments, with interest from the date of said contract, said payments to be made on the 29th of November in each year, or as much sooner as the plaintiff might choose to make them.

The plaintiff, on his part, agreed to purchase and pay for said land as above specified, and that he would, during the then ensuing winter, cut and deliver to the said Coburn, upon the bank of Beaver river, all the spruce timber then standing or being on said farm, Coburn to pay therefor certain prices per thousand feet, part of said sum to be indorsed on the contract, and part to be paid to the plaintiff as the work progressed.

By the said contract, the said Coburn further agreed to indorse on said contract one dollar for each one thousand feet of good merchantable hemlock logs, and to pay to the plaintiff two dollars per thousand in addition thereto as the work progressed.

Plaintiff agreed to peel hemlock bark, for which Coburn agreed to apply two dollars per cord of the price received for the same on the land contract, and the balance to be paid to plaintiff.

The said contract provided, that said Coburn should retain possession of said premises until the execution and delivery of the deed,

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and the entrance of the plaintiff upon and occupation of said premises by the plaintiff should be as a servant of said Coburn, and not otherwise. It further provided, that plaintiff should not cut or sell any timber standing or being on said premises prior to the delivery of the deed, except as in said contract expressly provided.

In the summer of 1870, R. N. Gere & Co., of Syracuse, being in want of timber for building a bridge across Black river, near the premises in question, applied to plaintiff to sell them certain kinds of timber needed for said bridge. The plaintiff applied to Coburn for his consent to the sale of said timber, Coburn refused to consent, unless Gere & Co. would agree to pay to him, once at least in each month, during the progress of the work, one-third part of the contract price for timber used as piles, and ten dollars per thousand for all hemlock used, and to pay him one-quarter of the contract price on all hard wood. Gere & Co. did agree to pay to Coburn the proportion demanded, and thereupon, bridge timber was got and used by Gere & Co. They paid to Coburn, on their agreement with him, \$431.68, and the balance of the price of the timber was paid to the plaintiff.

The plaintiff claims and insists that this sum of \$431.68 should be indorsed as a payment on said contract. The defendant, as the representative of said Coburn, claims and insists that this sum belongs exclusively to him, and is not applicable on the contract. Her ground for making the claim is that this sum was paid the intestate for his consent; the timber might be cut, and as a compensation for the injury to the land, whereby his security for the unpaid purchase-money was lessened.

The sole question for our consideration is whether defendant, as the representative of Coburn, is entitled to appropriate said money to the use of the estate, or whether plaintiff is not entitled to have it indorsed on his contract.

The referee, to whom the issues were referred for trial, has found that defendant, as administratrix, was entitled to said money, and that he was not under any obligation to indorse it on the contract.

The plaintiff, in his complaint, alleges that other sums besides the said \$431.68 had been paid to Coburn, to apply on said contract, and that he requested him (C.) to indorse, etc., said last-mentioned sum on the contract, but he refused, and therefore he (plaintiff) procured one Ward to offer to pay up for said land, and take a deed of the same, but Ward refused to pay unless said sum, with others,

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as to which there was no dispute, were indorsed; C. refused to indorse said sum, and no other offer or tender was made.

This action was then commenced to compel said Coburn specifically to perform said contract, upon payment to him of what should be found due thereon, after applying said sum of \$431.68, together with certain sums specified in the complaint. The referee dismissed the complaint, with costs, and from that judgment plaintiff appeals.

Coburn, by his contract, sold to plaintiff not only the land described in it but all the timber growing thereon. From the delivery of that contract the plaintiff was the equitable owner of the timber; the legal title remained in Coburn. *Dart. on Vend. & Purch.* 116, 306.

The plaintiff being restrained, by the contract, from cutting or selling timber until he got a deed of the land, it remained as security for the performance of the contract. If Coburn cut and carried away, or permitted to be cut and carried away, any of the timber, he was bound to account to the plaintiff for the value of such timber. He had, therefore, no title to the timber sold to Gere & Co., which was the subject of sale. But holding, as he did, the legal title, and the plaintiff being unable, without C.'s consent, to sell the timber, he (C.) might require the payment of such sum as he deemed proper as a condition precedent to giving his consent. This is what he claims to have done, and is substantially what the referee has found he did.

If any such condition was imposed, proof of it must be found in the evidence of Coburn himself.

He says plaintiff applied to him for his consent that the timber for the bridge be cut on the land. He refused several times. He (C.) was to have one-third of the price, and if it did not cost him one-third to get it out he would put the rest on the land contract. He (C.) consented, provided it was so arranged that the contractors should pay him what was coming to him. Gere & Co. refused to enter into a contract to pay C., and he refused his consent. He finally consented to take one-fourth of the hard wood and hemlock, and one-third of the spruce. Gere & Co. agreed to pay him their proportions, and he assented that the timber might be cut. There was no agreement that the proportion he was to have should be indorsed on the contract. When plaintiff first came to get his consent he offered him what he could get for sawing, to wit, \$3.50 per thousand feet. He said he (C.) would have for himself one-third.

He was making \$2 per thousand on the lumber and timber, delivered to him by plaintiff. Plaintiff said C. could have one-third for his interest in the timber. He (plaintiff) agreed to indorse on the contract what he got less C.'s one-third, and what it cost to get it out.

He (C.) asked plaintiff what he meant by C.'s taking one-fourth. Plaintiff said if C. took one-fourth, he would indorse one-third on the contract. C. was only to have one-fourth to indorse on the contract, and plaintiff said he would have one-third indorsed, but wanted him (C.) to take one-fourth instead of one-third for his share.

The plaintiff testified that there was no agreement to allow C. one-third or any other portion of the avails of the bridge timber.

Another witness testified that while he was at work for plaintiff, getting out the bridge timber, he (plaintiff) "told me he had to pay C.'s saw bill for some timber that C. did not get himself."

The referee finds that in August, 1870, it was agreed between plaintiff and Coburn that the former might cut and sell from the land described in the contract certain logs, lumber and piles to Gere & Co., and that defendant should receive from said firm, as payment to him for his portion of interest in said logs, etc., and his consenting to Gere & Co. having them; one-quarter of the price to be given for the hard wood and hemlock, and one-third of the price to be given for spruce and piles. He further found that it was agreed between plaintiff and defendant that after said proportional amount was paid to defendant, the balance of said money, coming from Gere & Co. for such timber, etc., should be applied on the contract for the purchase of the land, after deducting the expenses incurred in getting out the timber, etc.

Coburn doubtless intended to testify and the referee to find that the money to be paid by Gere & Co. to C. was for his (C.'s) sole benefit, and was in no contingency to be applied on the contract, but it is not distinctly so found. The finding is that the money was to be paid for C.'s proportion of interest in the logs, and his consent that Gere & Co. might have the logs.

C. had, as I have already remarked, no interest in the timber which was the subject of sale, so as to enable him to hold the avails for his own individual benefit, discharged of any claim of the plaintiff. If he sold, the plaintiff was entitled to have the proceeds applied on his contract, and the money paid by Gere & Co. to C. would, in the



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absence of an express agreement that C. might take it to his own use, be applicable on the contract; and we must assume that the referee has found that the money received by C. from Gere & Co. belonged to him (C.) in his own right, in consideration of his consenting to the sale of the timber to Gere & Co.

Coburn's consent furnished a sufficient consideration for the plaintiff's agreement that C. might receive such money to his own benefit.

The question whether the findings of fact are supported by the evidence is not before us, as the case does not state that it contains all the evidence.

The judgment in this case, if it shall be permitted to remain as it is, may be held conclusive against the plaintiff, on several matters embraced in the pleadings.

1st. Plaintiff claimed, and it was conceded on the trial, that C. had received, to apply on the contract, \$145, for timber, etc., sold from the land. The referee finds the fact, but holds that it furnishes no ground for sustaining the action.

2d. C. entered on the land and cut and carried away a quantity of timber, and this the referee finds furnishes no ground for sustaining the action.

3d. Ward offered to C. to pay up the purchase-money of the lands, and take a conveyance of the same, but the offer was conditioned upon the allowance by C. of the \$431 above referred to; the referee finds that, as the money was not applicable on the contract, it furnishes no ground for maintaining the action.

4th. There were sundry payments made on the contract in addition to those mentioned above, sworn to by the plaintiff, but there is no finding by the referee in regard to them.

The judgment dismisses the complaint, with costs; a dismissal of the complaint is as conclusive between the parties as a judgment giving relief.

It would be unjust to the plaintiff to deprive him of the right to maintain an action for specific performance upon facts entitling him thereto, and in that or some other action of the benefit of such payments as have been made on the contract.

The judgment should be modified, by inserting therein a provision that it should be without prejudice to the right of the plaintiff to bring another action. As modified, it should be affirmed with costs.

*Judgment accordingly.*

LEFEVRE, executrix, etc., v. LEFEVRE *et al.*, appellants.

*Will — construction of — misnomer of legates — void trust.*

A testator gave a bequest to the "Home of the Friendless, in New York." There was no institution of that name, but the American Female Guardian Society was proved to be frequently called by that name, and to have been so called by the testator while living. *Held*, that the said society would take the bequest.

The testator gave a bequest "to the Presbyterian Society of Carthage," another "to the Methodist Church of Carthage," and another "to the Baptist Church," without adding the words "of Carthage." It was proved that there was in Carthage only one Presbyterian Society, one Methodist Society, and one Baptist organization. These bodies were incorporated under names different from the names used by testator. *Held*, that the Presbyterian and Methodist Societies would take under testator's will, but the Baptist organization would not.

The testator left a portion of his estate "to the care of my wife, to be disposed of as she shall see fit, in charitable purposes." *Held*, that this was an attempt to create a trust not authorized by the laws of this State, and the provision was void.

APPEAL by the defendants, heirs at law of William C. Lefevre, deceased, late of Carthage, Jefferson county, N. Y., from a decree of the special term, entered upon the decision of Mr. Justice DOOLITTLE, giving construction to the last will and testament of said William C. Lefevre.

The testator died March 4, 1872, leaving personal property about \$45,000, and real estate \$2,000. He left surviving him his widow Pamela M. Lefevre, the plaintiff, but left no children or other descendants, and his only heirs at law and next of kin were his brothers and sisters, who are defendants in this action. His will was made March 1, 1872, and contained the following clauses:

"First. I give and bequeath to my wife, Pamela M. Lefevre, one-third of my whole estate, both real and personal, after my outstanding debts are paid and satisfied.

"Second. I give and bequeath to the Home of the Friendless, in New York, one-third of my estate, after my outstanding debts are paid and satisfied.

"Third. I give and bequeath to the Presbyterian Society of Carthage (\$2,000) two thousand dollars.

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“To the Methodist Church of Carthage, (\$1,000) one thousand dollars.

“To Julia Treat, wife of Alfred Treat, (\$2,500) two thousand five hundred dollars.

“To James T. Peden, (\$1,000) one thousand dollars.

“To Aunt Sena Hubbard, (\$250) two hundred and fifty dollars.

“To Frank Ward, (\$500) five hundred dollars.

“To the Baptist Church, (\$500) five hundred dollars.

“The remainder of this third, after deducting the above-mentioned sums, is to be left to the care of my wife, Pamela M. Lefevre, to be disposed of as she shall see fit, in charitable purposes; and I hereby appoint my wife, Pamela M. Lefevre, sole executrix of this, my last will and testament, hereby revoking all former wills by me made.”

There never has been, at any time, a corporation in the city of New York whose corporate name was the Home of the Friendless. A corporation named the American Female Guardian Society has been commonly called by the name of the Home of the Friendless. This institution the testator had visited, and had, after his return home to Carthage, talked about his visit, calling it by the last-mentioned name, and, a few days before the execution of his will, had spoken of it by the same name, which name, it was shown, was cut over the door of one of the buildings of the society, in marble letters. No other institution in the city of New York was ever known by such a name, and none appeared except the Female Guardian Society to claim the benefit of testator's bounty.

At the time of testator's death, and for some years previously, there had been only one incorporated Presbyterian Society or Church in Carthage, which was named the First Presbyterian Society of Carthage.

There was but one Methodist church, society or corporation in the village of Carthage, this was named “The First Society of the Methodist Episcopal Church in the village of Carthage.”

There was only one Baptist church, this was named “The Trustees of the First Baptist Church in the village of Carthage, in the county of Jefferson, New York.”

The various institutions named above were joined as defendants with the heirs at law. The heirs at law only appealed from the decision and decree of the special term.

*H. E. Smith*, for appellants. The will being made within two months of the death of testator, who left a wife, the bequest to the

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Home of the Friendless is invalid under our mortmain act. 2 R. S. 624, § 6 (5th ed.); *Beekman v. People*, 27 Barb. 303; Will. Eq. Jur. 576; *McCaughal v. Ryan*, 27 Barb. 376; *Bascom v. Albertson*, 34 N. Y. 584; Laws 1860, chap. 360; Willard's R. E. 501. Extrinsic evidence to show that bequest to Home of the Friendless was intended for American Female Guardian Society was inadmissible. *Mann v. Mann*, 1 Johns. Ch. 231; S. C. on appeal, 14 Johns. 1; *Jackson v. Sill*, 11 id. 201; *Tole v. Hardy*, 6 Cow. 333; *Myers v. Eddy*, 47 Barb. 263; 1 Redf. on Wills, 407, 530 (3d ed.); Bacon's Maxims Reg. 23 (25); 1 Greenl. Ev. 424 (10th ed.); *Delmare v. Robello*, 1 Ves. Sr. 412; *R. C. Orphan Asylum v. Emmons*, 3 Bradf. 144; *Beaumont v. Fell*, 2 P. Wms. 141. (*Contra* overruled.) *Miller v. Travers*, 8 Bing. 239; *Mostyn v. Mostyn*, 5 H. L. Cas. 168; *Hiscocks v. Hiscocks*, 5 M. & W. 363.

*Merwin & Mullen*, for plaintiff and respondent. A person or corporation, testator meant to describe, will take and extrinsic evidence is competent to show application of description. 1 Redf. on Wills, 691, § 42, pr. 40, 695, pr. 49; *Smith v. Smith*, 1 Edw. Ch. 189; S. C., 4 Paige, 371; 1 Greenl. Ev. 423, § 297; Wigram on Wills, 256, § 196; Roper on Legacies, 166; *Careless v. Careless*, 19 Ves. 601; *N. Y. Inst. for Blind v. How's Ex'rs*, 10 N. Y. 84; 1 Jarman on Wills, 330, 361, 363-7, 370 (4th Am. ed.); *Brewster v. McCall*, 15 Conn. 274; *Mynot v. Boston Asylum*, 7 Metc. 416; *Wilson v. Squire*, 1 Y. & C. Ch. 654; *Bradshaw v. Thompson*, 2 id. 295; *First Parish v. Cole*, 3 Pick. 232; *Queens College v. Sutton*, 12 Sim. 521; *Trustees v. Peaslee*, 15 N. H. 317; *Attorney-General v. Mayor of Rye*, 7 Taunt. 546; 2 Williams' Executor, 1035, note; Dayton's Surrogate, 415; *Miller v. Travers*, 8 Bing. 251; *Herbert v. Reid*, 16 Ves. 481; *Thomas v. Stevens*, 4 Johns. Ch. 607; 10 Bacon's Abridgment, 538; *Lee v. Pain*, 4 Hare, 251; Angell & Ames on Corp., § 99. The restriction of the statute as to wills made within two months before decease does not apply to the Guardian Society. Laws 1848, chap. 319, § 6; Laws 1849, chap. 244, § 4; Laws 1860, chap. 360; *Pierce v. Delamater*, 1 N. Y. 17; Potter's Dwarrris, 113, note, 154, note. The widow is entitled to her share of the residue not validly disposed of. 3 R. S. 183, § 82 (5th ed.); *Hoes v. Van Hoesen*, 1 Barb. Ch. 379; *Nickerson v. Bowley*, 8 Metc. 424; *Hart v. Marks*, 4 Bradf. 161; 2 Williams' Executor, 1343; *Pickering v. Stamford*, 3 Ves. 332; *Waring v. Ward*, 5 id. 676; *Garthshore v*

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*Chalie*, 10 id. 18; *Leake v. Robinson*, 2 Merivale, 363; 1 Jarman on Wills, 400 (4th Am. ed.); 2 Roper on Husb. and Wife, 23 (2d ed.); Dayton's Surrogate, 560 (3d ed.); *Doughty v. Stillwell*, 1 Bradf. 300. Doctrine of election don't apply. 2 Story's Eq. Jur. 1075; *Havens v. Sackett*, 15 N. Y. 365.

*Thomas D. Sherwood*, for American Female Guardian Society, respondent, cited, upon the question of the validity of the bequest to the Guardian Society, in addition to the citations of plaintiffs' counsel, *Banks v. Phelan*, 4 Barb. 80; *Parsons v. Parsons*, 1 Ves. Jr. 266; *Hornbeck v. Am. Bible Society*, 2 Sandf. Ch. 133; *Case of Chancellor of Oxford*, 10 Coke, 57; *Conden v. Clerk*, Hobart, 32; *Foster v. Walter*, Cro. Eliz. 106; *Dr. Ayray's Case*, 11 Coke, 20 b; *Tinker v. Seaman's Aid Society*, 7 Metc. 188. Parol evidence was admissible to identify a legatee. *Harris v. Bishop of Lincoln*, 2 P. Wms. 135; *Ulrich v. Litchfield*, 2 Atk. 372; *Hampshire v. Pierce*, 2 Ves. Sr. 216; *Bruce v. Denison*, 6 Ves. Jr. 397; *Walpole v. Cholmondely*, 7 T. R. 138; 2 Phil. on Ev. 247, 531; *Simpson v. Margitson*, 11 Q. B. 25; *Doe v. Roe*, 1 Wend. 542; *Tole v. Hardy*, 6 Cow. 333; *Schuyler v. Russ*, 2 Cai. 201; *Trustees v. Peaslee, executors*, 15 N. H. 317; *Minshull v. Minshull*, 1 Atk. 412; Wigram on Wills, proposition 5, Pl. 61-67, 212, 215; *Shore v. Wilson*, 9 Clark & F. 355; *Williams v. Crary*, 4 Wend. 443; *Attorney-General v. Clapham*, 4 De Gex, M. & G. 628; *Miller v. Gable*, 2 Denio, 492; *Blinkhorn v. Feast*, 2 Ves. Sr. 28; *Fish v. Hubbard's Executors*, 21 Wend. 651. Testator's declarations were admissible to identify legatee. *Beach v. Earl of Jersey*, 1 B. & A. 550; S. C., 3 B. & C. 870; *Vernon v. Henry*, 3 Watts, 391; *Smith v. Fenner*, 1 Gall. 170; *Robinson v. Whitley*, 9 Ves. 577; *Doe v. Allen*, 12 Ad. & Ellis, 451; *Cheyney's Case*, 5 Co. Rep. 68 a; *Doe v. Needs*, 2 M. & W. 129; *Reynolds v. Whelan*, 16 Law Jour. 434.

PER CURIAM. Judgment affirmed, upon the opinion of the special term, with costs, to be paid by Isaac Lefevre, the appellant.

The following is the opinion at special term, adopted by the general term:

DOOLITTLE, J. It is not necessary that a bequest to a corporation should be given to it by its corporate name to be valid. It can be given to it by description, which is sufficient to distinguish the

legatee from all other corporations. It may be given to it by a name by which it is commonly called, and by which the testator was in the habit of calling it.

When the bequest is given in this manner, a question of identity is raised, which it requires extrinsic evidence to solve. If a corporation can be found which is certainly designated by the description of the legatee in the will, the bequest is valid, and such legatee is entitled to it.

Parol evidence in such cases is admissible to identify the legatee, or to apply the description given in the will. It is not evidence to show the testator intended something different from what he had stated in his will, but to show what the words used in the will mean, or what the testator intended by them. *New York Institution for the Blind v. How's Ex'r*, 10 N. Y. 84, 88; *Brenstee v. McCull*, 15 Conn. 274; *Levy v. Levy*, 40 Barb. 610; *Trustees v. Peaslee*, 15 N. H. 317. A devise to a college by a name it bears in common parlance, though not the true corporate name, is good. 3 Pick. 232; see *PARKE'S*, Ch. J., opinion, 237, etc.

In the case of the *New York Institution for the Blind v. How's Ex'r*, the bequest was in these words: "I give and bequeath unto the trustees of the institution for the maintenance and instruction of the indigent blind in the city of New York, the sum of three thousand dollars."

A corporation in the city of New York, by the name of "The New York Institution for the Blind," an institution incorporated for the purpose of instructing children who have been blind, or may have become blind by disease or accident, claimed the bequest. It was proved there was no institution in New York engaged in the education or support of the blind, except the claimant. The institution was authorized to receive a certain number of pupils from the body of the State, for whom the State paid.

Judge DENTON, in his opinion in that case, says: "The question arises upon the description. It is a question of identity, and the point is, whether the legatee can be found and certainly identified by the description contained in the will. The description is not shown to be erroneous, though there be a different class of persons also to be relieved, or if some are to be instructed merely, and not supported." The description was held to identify the plaintiff as the legatee intended by the testator.

In the case of *The Trustees v. Peaslee*, the bequest was to the

"Franklin Seminary of Literature and Science, New Market, N. H." There was no other school or seminary of learning in that town except "The South New Market Methodist Seminary." *Held*, the last-named institution was sufficiently described in the bequest.

The following authorities seem to dispose of the questions raised and argued on the trial in regard to the admission of parol evidence in a case like the one under consideration.

"Extrinsic evidence is not admissible to show the intent of the testator, or that the will means something different from what it states, but is admissible to identify the legatee named or described in the will, or to apply the terms of the will to the object of the will or bequest. It is in aid of and to give effect to the will."

"Evidence to prove intention by parol declarations is entirely different from evidence to explain application of the will. The latter kind is always admissible. The executor seeks it when discharging the bequest of the will, and the courts demand it when the description of the subject or of the donee is to be applied." 3 Bradf. 144, 149.

"For the purpose of determining the object of a testator's bounty \* \* \* the court may inquire into every *material* fact relating to the person who claims to be interested under the will, \* \* \* for the purpose of enabling the court to identify the person intended by the testator. The same is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words." Wigram on Extrinsic Evidence in aid of the Interpretation of Wills, Proposition V.

Pl. 61, Example 1. "Where the *person* or thing intended by the testator is the point of contention, the office of court is simply to *declare* what person or thing is described in the will."

Pl. 62. "The proposition now under consideration asserts that in all cases calling for such a declaration, evidence as to the nature, *name*, marks, qualities, etc., of the subject mentioned in the will (whether person or thing) is admissible in order to enable the court to determine whether the description in the will applies or not."

Pl. 63. "If a man devise his estate, correctly described as the Manor of Dale, evidence must be admissible to show that a subject exists which answers the description in the will. This needs no authority."

Pl. 64, Ex. 2. "If the description in the will is *incorrect*, evidence

that a subject having such marks upon it exists, must be admissible, that the court may determine whether such subject, though incorrectly stated in the will, be that which the testator intended; no question can be raised for the opinion of the court without such evidence."

Pl. 65. "In the legitimate application of this process, a nickname has been held to be a sufficient description of the object of the testator's bounty, it being proved that the testator was in the habit of calling the legatee by such name.

Pl. 66. "So also a name given by reputation, though not strictly appropriate, may be a sufficient description of the person intended."

Pl. 67. "So a description, though false in part, may, with reference to intrinsic circumstances, be absolutely certain, at least sufficiently so to enable the court to identify the subject intended," etc. See O'Hara on the Interpretation of Wills, § 15, p. 45.

"In respect to the case of a nickname or other reputed designation, the principle upon which parol evidence is admitted seems identical with that which allows an inquiry into the circumstances surrounding the maker of the instrument, with a view to a right interpretation and application of the language which he has used. It is consistent with the office of exposition in the strictest case." 2 Phillips' Ev., Cow. Hill and Edw. Notes, ch. 8, § 4, note 519, p. 773.

"Evidence will be admitted to show that a testator has been in the habit of calling a particular person by a peculiar name, for the purpose of showing that such person was intended by that name when used in the will." *Ib.* original text, p. 768.

In the case of *Doe dem Hiscocks v. Hiscocks*, 5 Mees. & Wels. 363, so often cited against the admission of extrinsic evidence the Chief Baron LORD ABINGER, in giving the opinion of the court (p 367), after stating that parol evidence was admissible to show the meaning and application of the testator's words, says: "Again, the testator may have habitually called certain persons or things by peculiar names, by which they were commonly known. If their names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cypher or in a foreign language. The habits of the testator in these particulars must be receivable in evidence to explain the meaning of his will.

In *Blinkhorn v. Feast*, 2 Ves. Sr. 28, the Lord Chancellor said he



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never doubted that parol evidence was admissible to ascertain identity.

"Parol evidence is admissible to enable the court rightly to understand in what sense words are used in a deed," etc. *Attorney-General v. Clapham*, 4 De Gex, M. & G. 591, 628.

Parol evidence is admissible to show that the name mentioned in the will was the usual pet or nickname given by the testator to the party claiming the legacy to explain the meaning of the will. 2 Williams on Ex'rs, 1037-8; Angell & Ames on Corporations, 60; Wigram on Extrinsic Ev. (2d Am. ed., edited by O'Hara), p. 113; same proposition, 4 Pl. 62 to 67; same proposition, 4 Pl. 58 and notes; *Lell v. Paine*, 4 How. 251; *Thomas v. Stevens*, 4 Johns. Ch. 607; *Ryers v. Wheeler*, 22 Wend. 148, 150; *Tucker v. Seaman's Aid Society*, 7 Metc. 207, 809; 3 Pickering, 232, 237; 1 Jarmand on Wills, 330, 363-4, 367, 370; 7 Bacon's Abridgment, under title Wills and Testaments, sub. C. F.; *Clayton v. Lord Nugent*, 13 Mees. & Wels. 200, 207-8; *Parsons v. Parsons*, 1 Ves. Jr. 266; 3 Vesey, 148; Dayton's Surrogate (under mistakes in the name or description of the legatee) 383 (ed. of 1855), and cases cited; 1 Greenleaf's Ev., § 289.

A mere misdescription of the legatee does not render a legacy void, unless the ambiguity is such that it is impossible to ascertain, either by the will itself or from proof *dehors* the will, who was intended as the object of the testator's bounty. *Smith v. Smith*, 1 Edw. Ch. 189; 4 Paige, 27.

The evidence in this case discloses the fact that the charter of the American Female Guardian Society authorized it to establish and maintain "houses of industry and houses for the relief of friendless, destitute or unprotected females, and for friendless or unprotected children."

That soon after the charter was granted, and as early as 1849, the society erected a building in the city of New York for a home for the friendless, over the main door of which were cut, in a marble slab, the words "Home of the Friendless." That several buildings, before said will was made, were erected in connection with that building, by the society, which were used for its purposes. The office of the society and its general business was transacted in this cluster of buildings, and there was no name or sign on any of them except the one mentioned, "Home of the Friendless."

The society in common parlance in New York was and is called  
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"The Home of the Friendless." It is known at least as well, if not better, by that name than by its corporate name. Its correspondents, from all parts of the country, are, and were when the will was made, in the habit of addressing it as the "Home of the Friendless." One of its principal objects, and a large part of its actual business, is to furnish a home for the friendless. There is no other corporation in New York of that name, or known or called by that name, except the one in question.

The testator himself visited this institution about eight months before he made his will, and was in the building named the "Home of the Friendless," and noticed specially the manner children were provided for there. When he returned home on that occasion he called that society the Home of the Friendless, and was much pleased with the manner he saw it provided for the children. A few days before he made his will he spoke of this society as the Home of the Friendless, and called it by that name.

It appears this society, in common parlance, was called the "Home of the Friendless," and was known as well by that name as by its corporate name. It does not appear that the testator knew of any other society or corporation in New York called by that name, or that there was any other society in New York known to him which had established or maintained a home for the friendless.

No other society, except the one in question, has claimed the legacy. These facts very clearly identify the claimant as the legatee described in the will. If there are several bodies in New York known by the name of the "Home of the Friendless," then the question arises, does the evidence show which one of them the testator intended? I think it does. The testator knew the claimant was so called. He visited it, and himself called it the "Home of the Friendless." It does not appear he ever visited any other, or knew of the existence of any other, and the very terms of the bequest indicated he knew of but one in New York.

By section 6 of the act entitled "An act for the incorporation of benevolent, charitable, scientific and missionary societies," chapter 319 of the Laws of 1848, it is provided that any corporation formed under that act should be capable of taking real and personal estate by virtue of any devise or bequest contained in the will of any person, provided no person leaving a wife or child, or parent, shall devise or bequeath to such corporation more than one-fourth of his or her estate, after the payment of his or her debts, and such devise

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or bequest shall be valid to the extent of such one-fourth. And no such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator.

The defendant, the "American Female Guardian Society," was not incorporated under the last-mentioned act, but by section 4 of the act incorporating that society (Laws of 1849, chap. 244), it is provided that it shall have power to purchase and hold real estate sufficient for the actual occupation and necessary uses of the society, and receive by gift or devise, in the same manner and subject to the same restrictions as provided in the general law for the incorporation of religious and benevolent associations, and to hold and convey such real estate."

No provision was necessary to enable the society to take personal property by purchase or by bequest. It had that power without it. The section was not introduced simply to impose the limitations contained in section six of the said act of 1848. It was introduced to enable the society to purchase and to take, by gift or devise, sufficient real estate for the actual occupation and necessary uses of the society, and to hold and convey the same; and in giving that power it subjected it to the limitations contained in said section six. Said section four is inartificially drawn, but I think the intention of the legislature is quite clear. It first give the society the power to purchase the necessary real estate, then gives it the power to take it by gift or devise, and to hold and convey it. Such societies are founded on the idea that they are to be established and supported mainly by gifts.

It, in the first line of the section, gives the power in terms to *hold* the real estate acquired by *purchase*. The subsequent words, "to hold and convey such real estate," apply to that they should receive by gift or devise. The words of limitation introduced do not give the power, but simply qualify it. Reading the section and leaving out the words of limitation, the power intended to be given is more apparent.

"§ 4. Said corporation shall have power to *purchase* and *hold* real estate sufficient for the actual occupation and necessary uses of the society, and receive by gift or devise, and hold and convey such real estate."

It speaks of nothing but real estate. Being a charitable institution, founded on the idea that it was to be established and sustained by

charitable contributions, the legislature very naturally anticipated, that if it was to be a success, some portion, if not all the lands it required would be given to it, and gave it the power to take it from any person willing to give, provided the amount given by will did not exceed one-quarter of the whole estate of any donor who left a widow, parent or child, etc.

It is to be regretted that the two months' limitation has not been adopted as part of the general policy of the State. In the general act referred to it is in express terms limited to corporations formed under that act, and chapter 360 of the Laws of 1860 seems to indicate no disposition on the part of the legislature to extend the limitation, if it does not repeal it.

The validity of the bequests in the third clause of the will to the three churches depends upon the question whether the legatees are sufficiently described to be identified. The testator, at the time he died, and for several years prior thereto, resided with his family in the village of Carthage, in the county of Jefferson, where he made and executed his will. At the time he made his will, and for several years prior thereto, there were in said village the following named religious corporations, each of which had and occupied a church for religious worship, to wit:

"The First Presbyterian Society of Carthage."

"The First Society of the Methodist Episcopal Church in the village of Carthage."

"The Trustees of the First Baptist Church in the village of Carthage, in the county of Jefferson, New York."

And there were not, at the time said will was executed, or prior thereto, any other Presbyterian, Methodist or Baptist societies or church in Carthage.

The words, "*The Presbyterian Society of Carthage*," is a sufficient description by which to identify the claimant as the legatee intended, and the same is true of the words "*The Methodist Church of Carthage*." The words, "*The Baptist Church*," is not so particular a description as the others.

The words, "*The Methodist Church of Carthage*," distinguished the only church of that kind in that village, from all others. If there had been two Methodist churches, there is nothing in the description by which the one the testator intended could be identified.

There are a great many Baptist churches in this country, and,

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doubtless, several in the county of Jefferson. There is nothing in the description by which the one the testator intended can be identified. No evidence has been given to aid the court in applying the description, or identifying the legatee intended by the description, except that there is an incorporated Baptist church in Carthage, and but one. If there is any legal presumption that a legatee named in a will, whose residence is not stated, resides in the place where the testator resides and made his will, then that presumption, coupled with the description given, would be sufficient to identify the church intended.

The rule is, that a bequest can be given to a corporation by description, and it is valid when the description is sufficient to certainly designate the person or corporation intended, from all others. I do not think the description is sufficient, within the rule.

The testator, after having disposed of two-thirds of his estate, gives certain specific legacies out of the remaining third, and then disposes of the balance by the following words of the will, and by no others:

“The remainder of this third, after deducting the above-mentioned sums, is to be left to the care of my wife, Pamela M. Lefevre, to be disposed of as she shall see fit, in charitable purposes.”

It is not given to his wife to use for herself, or in such manner as she may deem best, but it is placed in her care, to be applied to such charitable purposes as she shall think proper. It is an attempt to create a trust not authorized by the laws of this State.

The trust is void, and such remainder thus attempted to be disposed of must be regarded as property undisposed of by the will, and must be distributed in the same manner as though the testator died intestate, according to the statute of distributions.

The personal estate is sufficient to pay the testator's debts and all the valid legacies given by the will. There is no express authority given by the will to the executrix to sell the real estate. The will provides for the distribution of the whole estate, and seems to require the conversion of the whole into money; but striking out the said bequests, the will does not purport to dispose of the whole estate.

ALLEN *et al.* v. BANTEL, appellants.

*Payment — notes of a third person — presumption of fact.*

Plaintiff sold defendant a buggy, and took as part payment the notes of a third person, upon the representation of defendant that the maker of the notes was solvent, and that if the notes were not paid, he (defendant) would pay them. *Held*, that the defendant was liable for the amount of the notes. Defendant's undertaking was evidence that the notes were not received as absolute payment; it was not necessary to be in writing, and plaintiff was entitled to commence action upon the non-payment of such notes at maturity, without an attempt to collect them of the maker.

APPEAL from a judgment of the county court of Monroe county, upon the verdict of a jury in favor of plaintiffs, in an action originating in justice's court.

In the summer of 1867, plaintiffs exchanged wagons with the defendant. The plaintiffs' wagon was a new one, and the defendant's an old one. By the terms of the exchange defendant agreed to give, in addition to his wagon, \$15 in money, and two notes against one Stephen Vaughn, for \$50 each. When defendant offered these notes in part payment of the difference between the prices of the two wagons, plaintiffs refused to accept them, on the ground that they did not know Vaughn, whereupon defendant stated that Vaughn was perfectly responsible, and would pay the notes when they became due. Plaintiffs then informed defendant, that they would take the notes on his responsibility and recommendation, and in no other way. Plaintiffs took the notes, and payment of the same not being made at maturity, sued Vaughn, the maker, and obtained judgment against him, which they were unable to collect by reason of Vaughn's insolvency. They then brought this action before a justice of the peace, after having tendered the notes to the defendant. Judgment was rendered in favor of plaintiffs for \$109 damages, and \$3.80 costs. Upon an appeal to the county court, the case was tried before a jury, who rendered a verdict in favor of plaintiffs for \$113.65.

J. C. Cochrane, for appellants

A. J. Wilkin, for respondent.

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MULLIN, P. J. The judgment appealed from must be affirmed.

The plaintiffs testified and the jury must have found that the notes made by Vaughn were taken in part payment of the buggy sold to the defendant, upon his guaranty that the maker was solvent and able to pay them, and that they would be paid, and if they were not, he, defendant, would pay them.

Notes of third persons thus taken are not deemed to be taken as absolute payment, and if not paid the person delivering them is liable for such part of the price of the property sold as the notes were intended to pay.

The general rule is, that the note of a third person transferred to the vendor of property in payment in whole or in part of the price of property previously sold is not payment, unless it is expressly agreed so to be. *Noel v. Murray*, 13 N. Y. 167; *Hays v. Stone*, 7 Hill, 128. But when the transfer is made at the time of the purchase, the presumption is, that it is received in payment, and the burden of proving the contrary rests on the creditor. *Whitbeck v. Van Ness*, 11 Johns. 409; *Rew v. Barber*, 3 Cow. 272; *Breed v. Cook*, 15 Johns. 241.

In the case in hand the notes were received as payment, but upon defendant's guaranty that the maker was responsible, and if he did not pay defendant would. Such an undertaking is evidence that the notes were not received as absolute payment. *Monroe v. Hoff*, 5 Den. 360; *Johnson v. Gilbert*, 4 Hill, 178; *Torry v. Hadley*, 27 Barb. 192; *Tyler v. Stevens*, 11 Barb. 485.

It is of no consequence whether the guaranty is in writing or by parol, nor whether it is valid or void. In either case it is evidence that the creditor did not accept the instrument as an absolute payment of his demand, and, therefore, when the note or other obligation becomes due, and it is then unpaid, the creditor may sue on the original debt and cancel such collateral security on the trial. *Waite's L. & P.* 408, and cases cited.

Such being the rights and liabilities of the parties the plaintiffs were not under any obligation to attempt to collect the notes of the maker, and the omission to do so is not negligence.

It was the duty of the defendant, if he desired to have the notes collected by suit, to have paid the plaintiffs the amount due them and taken up the notes.

The judgment is right, and must be affirmed.

*Judgment affirmed.*

CHRISTIE V. GAGE *et al.*

*Will—devise to church—conveyance by church—notice of application for leave to sell church property—adverse possession.*

A testator devised real estate to the trustees of a church, to hold or sell at their option, the avails, after payment of a specified amount to his heirs, to be invested, and the income applied to the uses of the church. *Held*, that the devise was valid and vested in the church, and not in the trustees, and it was necessary to obtain the consent of the court to sell the same.

In a deed of real property belonging to a church, the grant was by the church by its trustees, and the deed stated that the trustees in their official capacity "have hereunto set our hands and seals, hereby certifying that said church has no corporate seal." It was signed by the trustees as such, and a seal affixed to each name. *Held*, that the church, having no formal seal, might adopt one, and that annexed to the name of each trustee was the corporate seal of the church. Adding several impressions of the seal would not avoid it.

A deed given by a woman in 1834 was objected to on the ground that she was married, and her husband did not join in it. The only evidence of her marriage was a description of her in her father's will as the wife of T. D. *Held*, that to exclude the deed, proof of coverture must be given; it could not be presumed, and the recital in the will was not evidence as against one claiming under the deed.

Real estate was devised to a church subject to a provision that certain designated persons should share in the avails. *Held*, that such persons were not entitled to notice of proceedings, on behalf of the church, to obtain leave to sell the devised estate.

In order to constitute adverse possession which will avoid a deed given during its existence, it is not necessary that the occupant should have declared he was holding adversely. If he claims under a title that is adverse to the one giving the deed, it is enough.

ACTION of ejectment, tried at the Yates circuit in March, 1873, before Mr. Justice JAMES C. SMITH, and a jury. A verdict was rendered for the plaintiff. Exceptions were ordered to be heard in the first instance, at the general term.

The action was originally commenced against Franklin J. Green. He died, leaving Henry Gage and Carrie Green in possession of the premises, and they were substituted as defendants.

The case was tried in October, 1869, and the plaintiff was nonsuited upon the ground that, by a will under which both parties claim title, the person through whom defendants claim took a fee.



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The case was taken to the general term, where it was held that such person who had died before the action was brought took only a life estate, and a new trial was ordered. The other facts sufficiently appear in the opinion.

*J. A. Christie*, for plaintiff.

*David B. Prosser*, for defendant.

MULLIN, P. J. This is an action of ejectment, brought by the plaintiff, to recover nine-thirtieths of 100 acres of land in the town of Middlesex, in the county of Yates.

Both parties claim title under the will of Andrew Christie, who died in 1824, leaving a last will, wherein and whereby he devised the 100 acres in question to his grandson, Andrew Christie. The devise is without words of perpetuity, and we have held, at a previous term, that the devisee took a life estate only under the will.

The testator left surviving him six children, his only heirs at law. The plaintiff acquired title to the portion of the premises claimed by him, from the heirs of said testator.

The defendants claim that Andrew Christie, the younger, took the title to said 100 acres under the will in fee, and that the heirs of Andrew, the elder, took no title to nor interest in it, under said will, or otherwise.

Andrew, the younger, before his death, conveyed the 100 acres by quit-claim deed to one Loomis, Loomis conveyed, by a similar deed, to Lyman H. Green, upon whose death the premises passed to his son, Franklin J. Green, either by devise or descent, it is not shown by which. On the death of Franklin, the land descended to his daughter, Corie. Andrew, the younger, died in 1862.

It was admitted on the trial that defendants were in possession of the premises at the time they were substituted as defendants, claiming title under the will of Andrew Christie, deceased, and that Franklin J. died in possession of said premises in 1869, and that he held and claimed to devise title to said premises under the devise to Andrew, the younger, and defendants derive title to said premises under Franklin. It will be seen from the foregoing statement, that the claims of title diverge from the death of Andrew, the younger.

Up to that point of time, both parties concede that he had title. Upon his death, the plaintiff claims his estate ended, and the heirs

at law of Andrew, senior, had the title in fee in said premises. The defendants, on the other hand, claim and insist that Andrew, the younger, took an estate in fee in the land by the will of his grandfather.

This court having held that Andrew took a life estate only, under the will, it follows that the defendants have no title to the premises in question.

But as the plaintiff must recover upon the strength of his own title, and not upon the weakness of that of the defendants, it is insisted that he failed to prove on the trial, title to any portion of the premises. It, therefore, became necessary to examine the evidence that plaintiff relies on to establish his title.

David Christie, one of the heirs of Andrew Christie, the common source of title, became entitled, on the death of his father to one-sixth of the 100 acres. He purchased the one-sixth of one of his sisters, thus becoming owner of one-third of the land subject to the life estate of his mother and of Andrew, the younger.

In 1847, David Christie made a last will, in and by which he devised his share of said 100 acres to the trustees of the First Presbyterian Church of West Town, in the county of Orange, in this State, and to their successors in office, to hold or to sell and convey the same at their own option, the avails to a certain amount to be paid over to certain of his heirs, and the balance to be invested and the income applied to the uses of the church. In an event contemplated, the trustees might use the principal of the fund so retained by them and invested.

All the heirs of said David, save one, conveyed the interest which they acquired through said David to the plaintiff, by deed, dated July 10, 1866.

On the 28th March, 1865, the trustees of the First Presbyterian Church, above mentioned, conveyed to plaintiff the interest in said premises devised to it by said David Christie. The deed purports to be from the several persons who were, at the time, trustees of said church, and as such trustees, and is signed by them, and is sealed with a single seal, which is affixed to the left of the signatures. This deed was executed without the consent of any court.

In order to execute a deed which should convey the title of said church in and to said land, application was made to the supreme court for authority to the trustees of said church to convey said premises, and it was given. Thereafter, and on the 24th of Sep-

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tember, 1867, said trustees executed another deed to said plaintiff of the interest of said church in said premises. In that deed the grant is by the church by its trustees, and at the conclusion it is attested as follows: "In testimony whereof, we, in our official capacity as trustees of said church, parties of the first part, have hereunto set our hands and seals, the day and year first above written, hereby certifying that said church has no corporate seal." It is then signed and sealed, with a seal affixed to each name, and then follows the words, "Trustees of the First Presbyterian Church of West Town, in the county of Orange."

If the devise to the church should be held void, the title would be in the heirs of David Christie, and all of them, except one, have conveyed whatever interest they had to the plaintiff. If the devise to the church is valid, the plaintiff has acquired its title unless the conveyance is inoperative, because of the defective execution, or because the premises were occupied adversely when the deed was given.

A devise to a church is valid if the property devised is to be applied to the uses of the church. *Williams v. Williams*, 8 N. Y. 525. It was held by the Chancellor in *Matter of Howe*, 1 Paige, 214, that a religious society may take property which is to be applied in part to its own use and part in trust for others.

It only remains to inquire whether the deed from the church to the plaintiff was properly executed. The devise being to the trustees of the church, the title vested in the church, and not in the trustees. *Cammeyer v. Lutheran Churches*, 2 Sandf. Ch. 186; *People v. Fulton*, 11 N. Y. It was, therefore, necessary to obtain the consent of the court to the sale of the premises devised.

A seal being essential to a deed, in order to transfer the title to land, if a corporation has no formal seal, it may adopt any form of seal it deems proper, and the seal so adopted is the seal of the corporation *pro hac vice*. The seal annexed to the name of either one of the trustees is the corporate seal—the deed being that of the corporation and not of the individual trustees, and as adding several impressions of the corporate seal to a deed would not avoid it, the addition of a seal to the name of each trustee would not make the seal any the less the seal of the corporation.

David Christie got title to one-sixth of the premises in question, by a deed from his sister, Mrs. Dougherty. It is objected that as the deed was given prior to the passage of the married woman's act,

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and she being a married woman when it was executed, she could not convey her interest in the land except by uniting in a deed of it with her husband. As he did not unite in the deed, no title passed to David, and, consequently, none passed to the church nor to the plaintiff.

To avoid the deed because of the grantor's coverture, the fact of coverture must be proved, as it cannot be presumed. The only proof of it here is the statement in the will of Andrew Christie, her father. In a legacy of \$50 to her, he describes her as the wife of Thomas Dougherty. That will was made in 1824, and the deed from Mrs. D. is dated in 1834.

To make a recital evidence it must be against a party to the instrument or his privies in blood or estate — the fact recited must relate to the property, or right embraced in or affected by the instrument containing the recital, except in cases of pedigree. In those cases the recitals stand upon the same footing as the declarations of the person making the recital. 1 Greenl. Ev., § 26. Whether Mrs. D. was married at the time of the execution of the will had no connection whatever with the devise of the real estate, and her marriage to Thomas Dougherty was stated only for the purpose of description or identification of the person to whom the legacy of \$50 was given. I am of the opinion that the marriage was not proved by the recital, and hence the objection was properly overruled.

The defendant's counsel objected to the evidence of the proceedings of the church to sell the land devised to it on the ground that none of the persons entitled under the will of David Christie to share in the proceeds of the land devised to the church were made parties to the proceedings, and, as they were *ex parte*, they could not affect the heirs of said David.

The *cestuis que trust* entitled to a portion of the proceeds of the land devised to the church were two of the children of David Christie, and not the defendants in this action, or either of them. The court had power to order the church to sell, and the land was sold in pursuance of its order, and whether the parties entitled to the proceeds of the sale have been properly protected is entirely immaterial to the defendants. The statute does not require the *cestui que trust* to be served with notice of the proceedings to procure authority to sell.

The deed from the trustees of the church to Samuel Christie, dated 28th of March, 1865, of the interest devised to the church was objected

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to, because it was not sealed with their individual seals, but with a single seal. The objection was properly overruled. A single seal was sufficient for all the trustees. *Ludlow v. Simond*, 2 Caines' Cas. 1, 7, 42, 55; *Mackay v. Bloodgood*, 9 Johns. 285; *Townsend v. Hubbard*, 4 Hill, 351.

The objection most strenuously insisted on by the defendants to the title of the plaintiff is that, from the death of Andrew Christie, the younger, the premises were occupied by those under whom the defendants claim adversely to the title under which plaintiffs claim. The deeds from the trustees of the church, and from the heirs of David Christie, were both executed while the premises were held adversely.

I am unable to find any way to escape this objection. It is not necessary, in order to constitute an adverse possession that will avoid a deed given during its existence, that the adverse occupant should prove that he declared he was occupying adversely; it is enough that he claims under a title hostile to that of the party. Such is the very language of the statute. 1 R. S. 739, § 147; *Creary v. Goodman*, 22 N. Y. 170; *Fish v. Fish* 39 Barb. 513; *Holden v. Bell*, 33 id. 247.

If we are right as to the character of the possession at the time the deeds to the plaintiff were executed and delivered, the defendants' counsel was entitled to the instruction to the jury, requested by him, that the deeds under which the plaintiff claimed title to the premises in question were void.

The defendants' counsel moved for a nonsuit on several grounds, and among them, on the ground that, by the will of Andrew Christie, his grandson, David, took the remainder after the termination of the life estate of Andrew, the younger, if the latter did not take in fee. In the will of Andrew Christie, senior, it is provided, after devising the 100 acres to Andrew, his grandson, that "the remainder of land belonging to me, of the farm conveyed by Gale and wife, I hereby give and devise to my grandson, David, his heirs and assigns."

The motion for a nonsuit was denied, and defendants' counsel excepted.

By the previous provisions of the will 200 acres of the Gale farm had been devised, thereby leaving 100 acres remaining to be disposed of, and which it was the intention of the testator, we have no doubt, to pass by the clause of the will above-recited to his son David, and

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not the remainder of the estate after the termination of the life estate of Andrew, the younger. The language is very explicit, it gives the remainder of land belonging to me of the farm conveyed, etc. No room is left for construction or intendment.

Because of the refusal to instruct the jury as requested, a new trial is granted, costs to abide the event.

*Judgment accordingly.*

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HALLOCK, appellant, v. DE MUNN *et al.*

*Married women — contracts by.*

In order to maintain an action on the note of a married woman, it must be shown affirmatively that the debt was contracted, either for the purpose of carrying on a separate trade or business, or for the benefit of her separate estate, or for her own benefit on the credit of her separate estate.

APPEAL from a judgment entered upon the report of a referee.

The action is upon a promissory note described as follows :

“ \$185

TROUPSBURGH, May 17, 1870.

“ On or before two years from date, I promise to pay David Conderman or bearer, one hundred and eighty-five dollars, with use.

(Signed)

“ DIANNA C. DE MUNN.

“ JOHN F. DE MUNN.

“ JOHN F. DE MUNN, *Security.*”

The cause was tried before a referee. The only evidence given at the trial on the part of the plaintiff was the note itself. The only evidence on the part of the defendants was that Dianna C. De Munn was a married woman. The referee found that the said Dianna C. De Munn was, at the time of the giving of said note, a married woman, and had been for many years, and was the wife of the said John F. De Munn, and as a conclusion of law, held and reported that said note was void as to her, and dismissed the complaint.

Judgment was entered accordingly, from which the plaintiff appealed.

A. J. McCall, for appellant.

A. Hadden, for respondent.

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 People ex rel. Miller v. Griswold.
 

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E. DARWIN SMITH, J. The decision of the referee was clearly right. The notes and contracts of married women are still *prima facie* void at common law (*Ballin v. Dillaye*, 37 N. Y. 35), and only valid when made, as allowed under the statute of March 20, 1860 (Laws of 1860, chapter 90), entitled "An act concerning the rights and liabilities of husband and wife," as amended in 1862 (Laws of 1862, chapter 172).

In order to maintain an action on the note, or other contract of a married woman, it must be shown affirmatively that the debt was contracted, either for the purpose of carrying on a separate trade or business, or for the benefit of her separate estate, or for her own benefit, on the credit of her separate estate. This was held in *Kinne v. Kinne*, in this department, of the April term, in a brief opinion which I find published in 45 How. 68, following the case of *Yale v. Dederer*, 18 N. Y. 265; S. C., 22 id. 450; *Corn Exchange Ins. Co. v. Babcock*, 42 id. 614. These essential facts, to entitle the plaintiff to recover as against the defendant, Dianna C. De Munn, were not proved at the trial, and the referee properly dismissed the complaint as against her.

The judgment should be affirmed.

*Judgment affirmed.*

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PEOPLE *ex rel.* MILLER V. GRISWOLD, commissioner, etc., appellant.

*Highways — opening — discontinuance.*

A highway was regularly laid out, part of the damages resulting from the opening of the same released, and the remainder assessed in accordance with law. After this, the highway commissioner refused to open the highway, and upon application, instituted proceedings to discontinue it. An order of discontinuance was made and filed. *Held*, that the highway having been regularly laid out, and the damages released or assessed, it was the duty of the commissioner to open it. *Held*, also, that the highway not having been opened could not be discontinued, and the proceedings for that purpose were invalid.

APPEAL from an order of the special term, granting a mandamus to compel the defendant, Canning E. Griswold, the commissioner of highways of the town of Sheridan, Chautauqua county, to open and work a highway in said town.

In 1868, defendant was sole commissioner of highways in the said town of Sheridan, qualified and acting. In that year the relator, John Miller, a resident tax payer and freeholder of said town, presented to defendant an application asking the laying out of the highway in question, which was refused. In 1869, relator made a similar application to one Strong, who was that year commissioner, and proceedings were had so that the highway was duly laid out. It ran through the lands of relator, and one other. Relator released his claim for damages, and the damages of the other were assessed in the manner provided by law.

In 1870, defendant again became highway commissioner, and refused to open the highway. An application was made by other persons to defendant in that year, asking him to discontinue such highway, and upon this application proceedings were had in accordance with the statutes relating to the discontinuance of highways, and an order made and filed discontinuing said highway. From that order an appeal was taken by the relator herein, and the matter is still pending.

*Murray & Pattison*, for appellant.

*Morris & Russell*, for relator.

E. DARWIN SMITH, J. The proceedings of Commissioner Strong in the year 1869, in laying out the highway in controversy, were confessedly regular and valid, and the damages of the relator being released, and those of the only other party affected, duly assessed according to law, the duty of the appellant to open said highway is clear and undoubted, unless he is discharged from such duty by the proceedings instituted and had by and before him for the discontinuance of such highway.

By section 2, article 1, title 1, chapter 16, part 1 of the Revised Statutes, entitled "Of Highways, Bridges and Ferries" (1 R. S. 502), commissioners of highways are empowered in the manner and under the restrictions provided in said chapter to lay out new roads, and to discontinue such old roads and highways as shall appear to them, on the oath of twelve freeholders of the same town, to have become unnecessary.

The highway in question never having been opened, cannot be called or considered an old road, and cannot obviously be discon-



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tinued by the proceedings and in the manner prescribed in this statute in respect to old roads.

The proceedings taken by the appellant to discontinue said highway were, therefore, clearly unauthorized and void. The proceeding was obviously designed to review and reverse the action and decision of his predecessor in office in laying out such road. The proceedings prescribed for the discontinuance of highways, clearly, cannot be resorted to for such a purpose, as was well held in the case of *People ex rel. Lyn v. Pike*, 18 How. 70, and *Miller v. Garlock*, 8 Barb. 157.

This view does not conflict with the power of the commissioners of highways to discontinue a highway, when by reason of alterations made therein, or by the opening of a new road, or in any other way, the same shall be abandoned by the public and no longer used as a public road, pursuant to section 15 of chapter 174 of the acts of 1853, relating to the opening and discontinuing of highways. Such, I presume, was the fact in respect to the highway in question in the case of *People ex rel. Clark v. Commissioner of Reading*, 1 N. Y. Sup. 193.

The order made at special term directing a mandamus to issue to the appellant, requiring him to open said highway, was, doubtless, based upon the assumption that all the proceedings taken by him to discontinue said highway were entirely unauthorized and wholly void.

This assumption was clearly correct, and the order should be affirmed, with costs, to the relator.

*So ordered.*

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SIEGEL v. SCHANTZ *et al.*

*Practice on appeal — negligence — master and servant.*

When exceptions are ordered to be heard, in the first instance, at general term, the party moving for a new trial is confined to the exceptions taken at the trial, and also loses his right of review upon the evidence embraced in the case.

Defendant's foreman, who had charge of his shop, employed plaintiff's son, a boy twelve years old, to work in the shop. Under the foreman's direction, the boy worked upon a machine by which he was injured. *Held*, that the foreman stood in place of the master as to the subordinate employees of defendant, and his acts and negligence were the acts and negligence of defendant.

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Siegel v. Schantz.

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EXCEPTIONS ordered to be heard, in the first instance, at general term. The action was brought by the father of a minor son for injuries received by such son from a machine in defendant's cabinet-factory, while working as an employee of defendant.

The injured boy was about twelve years old. He was engaged to work in the factory by defendant's foreman, at twelve shillings per week. He was first employed in sweeping and cleaning about the shop, and, afterward, put to work upon a tenanting and mortising machine. While working upon this machine, he was accidentally injured in the arm. During all the time the boy was in the factory he was under the direction of the said foreman. Defendants never had any personal knowledge of either his hiring or the kind or character of his work.

It was claimed by plaintiff that the boy was not employed for the purpose of working upon the tenanting machine, but only to do chores, and that it was negligence to require him to work upon said machine. Evidence was given that plaintiff did not know the kind of work his son was doing, and the employment of such son upon the tenanting machine was without his consent.

The jury found a verdict in favor of plaintiff for \$500, and defendants move, at the general term, for a new trial, upon exceptions ordered to be heard as above stated.

*L. H. Hovey*, for plaintiff.

*J. C. Cochrane*, for defendant.

E. DARWIN SMITH, J. When exceptions, as in this case, are ordered at the circuit, to be heard in the first instance, at the general term, the party moving for a new trial is confined to the exceptions taken at the trial, and he also loses the right of review upon the evidence embraced in the case which he might have had if the motion for a new trial had been, in the first instance, made before the circuit judge who tried the case, or another judge at special term.

When the judge who tried the cause at the circuit sat also in general term, it was almost a matter of course to send the exceptions to the general term, to be heard in the first instance, where the judges not oppressed with labor had ample time for their consideration, but under our present system, where the review is by different judges, the practice operates less advantageously to the parties in the prac-

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tical loss of one review, and is more burdensome to the general term than it would be if we were only called upon to review the decision, upon careful consideration of one of our brethren, made at the circuit or at special term.

In this case but a single exception, taken by the defendants' counsel, comes before us for consideration.

At the close of the charge of the judge, the counsel for the defendants excepted to that portion of the charge which held or stated that the defendants were liable for the gross negligence of their foreman.

This foreman, acting for the defendants, employed the plaintiff's minor son, a boy of twelve years of age, and set him at work in the defendants' factory; superintended the defendants' work in said factory, and directed and controlled the plaintiff's son in his particular work and service therein. This was all done for the benefit of the defendants, and in the ordinary course of his employment and business as such foreman. His acts and negligence in the charge and service and ordinary work of the defendants, and his general directions in regard to the work and service of the persons under him in the employment of the defendants, must be deemed the acts and neglect of the defendants. He stood in the place of the master to the subordinate employees of the defendants in such factory, and was bound to see to it that this boy was not placed in dangerous positions for work above his years.

The charge of the circuit judge, in this particular, was, I think, entirely correct, and I see no ground of error upon which a new trial in the case can properly be granted.

A new trial should, therefore, be denied, and judgment ordered upon the verdict.

*So ordered.*

BUSH v. HICKS *et al.*, appellants.

*Mistake of fact—Evidence—when parol admissible to contradict writing—Admissions of one in privacy with party.*

The description in a deed, in consequence of a mutual mistake of the grantor and grantees as to the location of a point in a boundary line, embraced more land than was intended to be conveyed. *Held*, that equity could relieve against the mistake and reform the deed, and that such mistake might be shown by parol evidence.

*Held*, also, that the admissions of one of the grantees under said deed made while in possession, concerning the location of a boundary line, were evidence against himself and all those claiming under him.

APPEAL from a judgment entered at the Yates special term in an equity action to reform a deed. The facts appear in the opinion.

*David B. Prosser*, for appellants, cited, *Leavitt v. Palmer*, 3 N. Y. 19; *Nevius v. Dunlap*, 33 id. 676; *Kent v. Manchester*, 29 Barb. 597; *Hunt v. Rousmaniere*, 1 Pet. 14; Story's Eq. Jur., §§ 150, 155, 156, 166; *Storrs v. Barker*, 6 Johns. Ch. 169, 176; *Lyman v. United Ins. Co.*, 2 id. 630; *Irnham v. Child*, 1 Brown Ch. 93; *Bloomer v. Spittle*, 2 Eng. 372.

*Morris & Leary*, for respondents, cited, *Howell v. Biddlecon*, 62 Barb. 131; *Meyer v. Amidon*, 45 N. Y. 169; *Carman v. Pultz*, 21 id. 547; *Smith v. Mackin*, 4 Lans. 41; *Rider v. Powell*, 28 N. Y. 310; *Johnson v. Taber*, 10 id. 319; *Pitts v. Wilder*, 1 id. 525; *Keaton v. Dimick*, 46 Barb. 158; *Tibbs v. Morris*, 44 id. 146; *Botsford v. McLean*, 45 id. 478; *Nevius v. Dunlap*, 33 N. Y. 676; *Stoddard v. Hart*, 23 id. 556.

TALCOTT, J. This is an action by the plaintiffs, as the grantors in a deed made in 1866 to James E. Hicks and George Mattice, to reform the said deed as to the description of the land conveyed, on the ground of mistake. The defendant Henry Hicks is the grantee of Hicks and Mattice, and is alleged to have purchased with notice of the mistake in the description. The facts, in substance, found by the court are briefly as follows: The plaintiff, Bush, being the owner of the two parcels of land, first described in the complaint, con-

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tracted to sell them to James E. Hicks and Mattice, and for the purpose of performing that contract executed the deed in question, which was intended, and understood by all the parties to it, to convey the said two parcels of land, and no other. At the time of making said contract and executing the said deed, Bush was also the owner and in possession of another parcel of land adjoining the said two parcels on the west, which, with the first described of the two first-mentioned parcels, constituted a part of a tract known as lot number 39. By a mutual mistake of facts on the part of all the parties to the said deed, the description therein contained was so drawn as not only to include the two parcels contracted and intended to be conveyed, but also the adjoining parcel mentioned, as well as some other portions of said lot 39. The mistake consisted in supposing that the point which was the north-west corner of the first of the two lots intended to be conveyed, and the south-west corner of the second, and which was, in fact, in the north line of said lot 39, was the north-west corner of said large lot 39; and in describing the premises in said deed according to such mistaken supposition; whereas, in fact, the point referred to was several chains east of the north-west corner of lot 39. The actual location and extent of the two parcels intended to be conveyed were viewed and inspected by the parties, and were understood correctly and alike by the parties to the contract and deed, and the grantees forthwith took possession of the parcels intended to be conveyed, and no other. While the plaintiff, Bush, continued in the possession of the other parcel on the west and has ever since remained in possession, claiming to own the same. Henry Hicks participated in the negotiations between the plaintiff and Hicks and Mattice, and knew and understood what land was intended to be sold and designed to be embraced in the said deed. And also knew, by view and inspection, the actual location and extent of the said two parcels intended to be conveyed, and when he took a conveyance from James E. Hicks and Mattice he intended to purchase, and they intended to convey, only the said two parcels then supposed to have been conveyed to the plaintiff; and all the parties up to that time erroneously supposed that the north-west corner of lot 39 was at the point where it had been erroneously supposed to be when the plaintiffs' deed was made.

Upon the state of facts thus found, there seems to be no reason to doubt but that the plaintiff is entitled, against all the parties, to have his deed to Mattice and Hicks reformed as to the description.

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It is, perhaps, superfluous to cite any authorities to sustain a proposition so well settled as this. The case of *Johnson v. Taber*, 10 N. Y. 319, may, however, be referred to as very directly in point. The positions of the counsel for the appellants seem to be chiefly based upon the idea that relief cannot be had in such a case upon parol evidence, and upon the theory that, whatever may have been the intention of the parties, and notwithstanding any mistake as to the defect of the description growing out of a misapprehension as to the precise land embraced in it, the deed as drawn and executed, if its contents were known to the grantor, is conclusive, and that parol evidence cannot be received to show any mistake or an intention different from that expressed by the description. This is so at law, but equity, from time immemorial, has relieved against mistakes of fact in deeds. And although the evidence upon which to reform a deed should be very clear and satisfactory, still it may be by parol aided by surrounding circumstances. The only question then, on the merits in this case, is whether there was sufficient evidence to warrant the special term in coming to the conclusion on the facts which is set forth in the findings. Upon a careful examination of the testimony, and assuming that the questions as to the credibility of the respective witnesses in cases of conflict are to be decided as they must have been decided by the special term before which the witnesses appeared, we think not only that the justice at the special term was fully authorized to arrive at the conclusions he did upon the facts, but that there can scarcely be a doubt but that the precise mistake of fact as to the amount of land embraced in the description contained in the plaintiff's deed was made by all parties at the time of the purchase by and conveyance to Hicks and Mattice, and that the same misunderstanding continued till after the conveyance by the former to Henry Hicks, who really only intended to purchase precisely what was understood to have been bought by Hicks and Mattice. There are some exceptions to the admission of evidence, none of which, however, seem to be very material. It seems that the deed from Spencer to the plaintiff contained the same mistake, and it appeared that the plaintiff had taken the Spencer deed to his attorney with a view to have the deed to Hicks and Mattice drawn from it. The defendants also insisted that the agreement was that the plaintiff was to convey the premises conveyed to him by Spencer. It was, therefore, competent to show that the plaintiff did not at that time know of the mistake in the Spencer deed. Upon the same ground, the evi-

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dence that the mistake in the location of the north-west corner of lot 39 was made at the time the plaintiff purchased and took the deed from Spencer was competent.

The evidence of what Mattice said as to the location of the west line of the premises purchased by himself and Hicks was competent. *Pitts v. Wilder*, 1 N. Y. 525. Mattice and Hicks were then in possession under this deed from the plaintiff. The declarations of Mattice on the subject were competent evidence against himself, and all claiming under him. The representatives of Mattice were defendants in the suit; Henry Hicks also, the principal defendant, claimed under Mattice. The evidence, therefore, was admissible in the case, and the objection was general and not confined to the defendant James Hicks. The parol testimony to the effect that Wagener owned the land on the west was not material. The witness Henry Wagener stated that he occupied it, while Spencer occupied the premises intended to be conveyed by the plaintiff's deed, which is sought to be reformed. This possession was legal *prima facie* evidence of title, and the statement of the witness as to the ownership was wholly immaterial, and could have had no effect in the case. The establishment of the line between Wagener and Spencer, if important at all, could be shown by parol evidence. The general motion for a nonsuit involved nothing but the merits, which we have heretofore considered.

An objection is made to the form of the judgment in this, that it perpetually restrains the defendant Henry Hicks from further prosecuting an action of ejectment which he has commenced to recover the possession of that portion of the premises which was by mistake embraced in the plaintiff's deeds, and also perpetually enjoins the institution of any action in the future to recover the same land. The enjoining of the prosecution of the suit already commenced was proper, inasmuch as the defendant did not, in his pleadings or otherwise, allege or pretend that he had or claimed any other title except such as he claimed by virtue of the mistaken description in the deed. The enjoining of any future action to recover the same land went further than the rights of the plaintiff, as determined in this case, required, if the decree could be construed (which is doubtful) as prohibiting an action in the future founded on any other title to be acquired hereafter. The decree, therefore, to be free from ambiguity and to conform precisely to the rights of the parties as determined, should except from its restraint future

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actions—actions which may be founded on some right or title acquired subsequent to the decree. This, however, is a mere matter of form which would doubtless have at once been corrected if suggested to the special term, or even to the plaintiff's attorney, and was not at all the ground of the appeal.

The judgment may, therefore, be modified by adding the words, "except upon some right or title which may be acquired hereafter." And as modified, the decree is affirmed, with costs to respondents.

*Ordered accordingly.*

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PEOPLE *ex rel.* DORN *et al.* v. JONES, commissioner, etc., *et al.*

*Highways—alteration of—order for—former order reversed on appeal—certificate of freeholders.*

A commissioner of highways made an order altering a highway. From this order an appeal was taken, and the matter referred to referees who reversed the determination of the commissioner. Within a year after the decision of the referees was filed, an order was made by another commissioner, directing the same alteration as the first order. *Held*, upon *certiorari*, that the second order was in contravention of the provision of the statute (Laws 1847, ch. 455, § 9), that a decision of referees in a highway appeal "shall remain unaltered for the term of four years from the time the same shall have been filed in the office of the town clerk."

The owners of the land to be taken for the alteration of a highway consented to the taking of the same, and filed a release of damages in the town clerk's office. *Held*, that a certificate of freeholders, of the necessity of the alteration, was not necessary.

CERTIORARI bringing up proceedings of the commissioner of highways of the town of Boonville, in relation to the alteration of a highway. The facts appear in the opinion.

C. D. Adams, for relator.

Fisk & Ballou, for respondent.

TALCOTT, J. The commissioner of highways in this case has proceeded to make an alteration of the highway in question, by altering the location of the point near where it joins the Jackson road, so called, effecting the alteration by discontinuing a part of the old



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highway, and laying out a new one from the point where the discontinuance commenced to the Jackson road. But two objections are made by the relators to the validity of the proceedings of the commissioner of highways. First, it is said that this is the precise alteration which was attempted by a former commissioner of highways of the town in 1871, and that from the former order of the then commissioner an appeal was taken, the matter referred to referees, pursuant to the statute, that the referees reversed the determination of the commissioner; and that the order made by the present commissioner was within four years from the time when such decision was filed in the office of the town clerk.

The language of the statute on which this objection is based is, perhaps, not wholly free from obscurity. It is as follows: "Every referee appointed under the preceding section shall be entitled to receive two dollars for every day employed in the hearing and decision of such appeal or appeals, to be paid by the party appealing where the determination of the commissioners shall be confirmed, but where it is reversed, to be a charge upon the county; and when the referees shall make any decision, laying out, altering, or discontinuing any road in whole or in part, it shall be the duty of the commissioners of highways of the town to carry out such decision in the same manner as required in cases of final determination of appeals as provided by the thirteenth section of the act hereby amended, and such decision shall remain unaltered for the term of four years from the time the same shall have been filed in the office of the town clerk." Laws of 1847, chap. 455, § 9. It is claimed by the counsel for the respondent that the words "such decision," in the last clause of the section, refer and are confined to the decision specified in the next preceding clause, namely, a decision laying out, altering or discontinuing any road; and, from the punctuation, it would seem that such was the meaning. Punctuation, however, is a very uncertain, and never a controlling guide, in the construction of statutes. It appears to us that the intent of this provision under discussion was to secure some stability in the decisions upon such appeals, for the short period specified in the act. The reference especially to a decision laying out, altering or discontinuing a road, is for the purpose of clearly imposing upon the commissioners the obligation to carry the decision of the referees into effect, in case the effect of that decision was to lay out, alter or discontinue a highway, in which case the action of the commissioners would be neces-

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sary. And we think that the words "such decision," may well be held to refer to the word "decision" in the first part of the section, and to embrace the decision of the referees on the question, whether it reverses or affirms the decision of the commissioner, and whether its effect is to lay out, alter or discontinue a highway, or to prevent it from being laid out, altered or discontinued. It was said by the court in *People v. Pike*, 18 How. 70, that the policy of this provision was to prevent litigation for the period specified, in regard to the road, after the decision on appeal. Again, in one sense, the decision of the referees was a decision altering a road. The commissioner had undertaken to lay out a new road and to discontinue part of an old one, and the determination of the referees amounted to a decision altering the road as laid out by the commissioner.

In regard to the second point, namely, that the necessity of the alteration was not certified by a jury of freeholders, the objection is not well taken.

The certificate of the freeholders is only necessary where the highways are laid out through inclosed, improved or cultivated land, without the consent of the owner or occupant. 2 R. S. 395 (5th ed.), § 73; *Garretson v. Clark*, Hill & Denio, 162; Thompson on Highways, 180.

The case referred to by the relator (*Carris v. Commissioners of Waterloo*, 2 Hill, 443) was obviously a case where the proceedings were without consent. In this case it appears that the owners of the land to be taken have consented and duly filed a release of damages in the town clerk's office.

We think the proceedings must be reversed, upon the ground that four years had not elapsed since a determination by the referees on appeal, of the same question namely, whether this alteration should be made.

*Proceedings reversed.*

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McNeal v. Clement.

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## MCNEAL v. CLEMENT, appellant.

*Contract — non-performance of — Waiver.*

In an action to foreclose a mechanic's lien, it appeared that the plaintiff refused to perform certain portions of the work agreed to be done by him under his contract with defendant, although requested by the defendant to perform it. *Held*, that the plaintiff was not entitled to recover for the work done.

*Held*, also, that the fact that defendant lived in the building upon which the work was done, during its performance, and in some things directed the manner of its execution, did not constitute a waiver of the fulfillment of the contract.

APPEAL from judgment for the plaintiff, entered upon the report of a referee, in an action to enforce a mechanic's lien.

On the 27th of November, 1871, the parties entered into a written contract whereby plaintiff agreed to do certain work, and furnish materials therefor, upon a hotel belonging to defendant, for the sum of \$1,300, payable in installments. Within a few days thereafter, and before any thing was done under the contract, a parol agreement was made by the parties which materially altered the written one, and provided for the payment of the further sum of \$150 to plaintiff. A further agreement was also made by parol providing for additional work and materials, for which plaintiff was to receive \$100 additional.

Plaintiff entered upon the performance of the work agreed to be done, and while doing it performed, at the request of defendant, considerable extra work and furnished the materials therefor. The value of the extra work and materials, as found by the referee, was \$340.

The work done by plaintiff was completed about the 27th of April, 1872. During the whole period of its continuance defendant lived in the hotel; was about where the work was going on, and in some things directed the manner of its execution.

It was found by the referee that some of the materials furnished by the plaintiff were not of as good quality as those called for by the agreements of the parties, and that some of the work was not performed in a good and workmanlike manner, by reason of all which defendant was damaged to the amount of \$431.20. He also found that "by the contract plaintiff was to put seats on the piazza in

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front of the hotel to correspond with those on the old piazza; also fenders in front of the posts; to build an entrance to the cellar, and to put two windows in the west room up stairs. But he failed and refused to perform his contract in the several particulars above set forth, although requested by defendant to complete the same."

The referee found that the value of the work performed by plaintiff was \$1,459.80; that plaintiff had paid thereon \$752.32, and as a conclusion of law that defendant was indebted to plaintiff for the balance of \$707.48.

*Gott, Garfield & Hoyt*, for appellant.

*Graves & Brown*, for respondent.

TALCOTT, J. The foundation of the plaintiff's action is a written contract to make certain alterations and repairs upon a building belonging to the defendant, with a further and additional parol contract providing for certain changes in the original plan. The referee in his findings, after stating the making of the contracts and that the plaintiff entered upon the performance thereof, finds that "during the time that plaintiff was engaged in said work the defendant lived in said house, and in some things directed the manner of its execution; and also directed that certain other work not mentioned, in either agreement with said plaintiff, be done," and that said extra work was done, etc. The finding then proceeds as follows: "And I further find that some of the materials, as furnished by plaintiff to defendant, were not of as good quality as those called for by the agreements of the parties, and that some of the work performed as aforesaid was not performed in a good and workmanlike manner, by reason of which defendant suffered damages in the sum of \$431.20." The referee then finds that the materials furnished and work performed by plaintiff for the defendant was worth the sum of \$1,459.80, of which sum there was paid by the defendant to the plaintiff, from time to time during the continuance of the work, the sum of \$752.32, and as a conclusion of law he finds that the defendant owes the plaintiff \$707.48, with interest from the 24th day of May, 1872; for which sum he directs a judgment: On the settlement of the case, the referee inserted therein, on the request of the defendant's counsel, the following additional finding: "That, by the contract made between the plaintiff and defendant, plaintiff

was, among other things, to put seats on the piazza in front of the hotel, to correspond with those on the old piazza; also fenders in front of the posts; to build an entrance to the cellar, and to put two windows in the west room up stairs. But he failed and refused to perform his contract in the several particulars above set forth, although requested by the defendant to complete the same." Thus we see, that, according to the facts as found by the referee, the plaintiff neglected and refused to perform his contract in three most important particulars: 1st, in materials; 2d, in workmanship; and 3d, in absolutely refusing to do or attempt to do certain things which by the contract he had agreed to do.

On looking into the evidence, it appears that these findings by the referee were unavoidable, and that the violations of the contracts on the part of the plaintiff were important and willful. It seems to be quite clear that the referee, in holding that the plaintiff is entitled to recover in such a case, has wholly mistaken the rules of law applicable to actions on contract. Where there is a special contract for work, labor and materials upon one side, and payment upon the other, the due performance of the contract is a condition of the right to recover, and builders have no immunity from this rule of law. The idea that a party who makes a contract with a builder is wholly at his mercy, and is not protected by his contract against the neglects, refusals and reckless and willful violation of its terms by the other party, has frequently been considered and uniformly condemned by the courts of this State.

The report of the referee in this case is quite similar to that in the case of *Smith v. Brady*, 17 N. Y. 173. And the opinion delivered by Judge COMSTOCK in that case, and concurred in by all the court, is quite applicable to the case at bar. A part of the opinion is as follows: "The particulars in which the referee found the contracts not performed are not stated in his report, but they could not have been so unimportant that the law will refuse to notice them, because, in the same report, the value of those particulars is ascertained to be over \$200. Nor is it found that the plaintiff intended to perform his contract. For aught that appears, the omissions and defects were intentional and willful; and in the absence of all explanation, the presumption is that they were so. \* \* \*

To conclude, there is, in a just view of the question, no hardship in requiring builders, like all other men, to perform their contracts in order to entitle themselves to payment. \* \* \* If he fails to

perform, when the requirement is plain, and when he can perform if he will, he has no right to call upon the courts to make a new contract for him, nor ought he to complain if the law leaves him without remedy."

In *Smith v. Brady*, the whole amount of the contract was \$4,900, and the referee found the damages sustained by the defendant, for deficiencies in work and materials, to be \$212.57. In the case at bar, the whole amount of the contract, both written and by parol, was \$1,550, and the damages sustained by the defendant, for deficiencies in workmanship and materials (to say nothing of the items wholly omitted to be done in any manner), is \$431.20

In the leading case of *Jennings v. Camp*, 13 Johns. 94, the court held that the rule that, if there be a special agreement and work done under it, the plaintiff may recover on a *quantum meruit*, has no application to such a state of facts as exist in this case. That the rule referred to supposes a performance of the contract with variations from the agreement, probably with the assent of both parties, and was never intended to embrace the case of a willful dereliction from the contract when partly executed by one of the parties without the assent and against the will of the other. The fact is, as intimated in *Smith v. Brady*, *supra*, it is not the office of courts to make or alter contracts, or to undertake to say that a party, who has bargained for one thing, shall accept and pay for another in lieu thereof. If the party entitled to a performance sees fit to waive a full and strict compliance with the terms of the contract, such is his right, and, as a question of fact, courts and juries put a very liberal construction upon such acts of the parties as have a tendency to show an intent to waive strict performance. But a clear and willful violation of the contract, where performance is not waived, is as complete a bar to a recovery on a contract for building as on any other. The case of *Smith v. Brady* was followed in *Bonesteel v. Mayor of New York*, 22 N. Y. 162; and in *Cunningham v. Jones*, 20 id. 486; which latter case, like the one at bar, was an action to enforce a mechanic's lien. The same principles were fully recognized and adopted in *Pike v. Butler*, 4 N. Y. 360; in *Pullman v. Corning*, 9 id. 93; and in *Tompkins v. Dudley*, 25 id. 272.

The referee does not find that the defendant, in this case, waived the performance of the contract, in regard to the particulars in respect to which the plaintiff violated it. It is true he finds certain

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facts, from which he perhaps supposed that this court could draw the inference of a waiver, namely: That "during the time the plaintiff was engaged in said work, the defendant lived in said house and was about said work, and in some things directed the manner of its execution." If this finding amounted to any thing, it would be a mere finding of the evidence and not of any material fact; but the facts stated, as they are stated, fall short of being sufficient to authorize even a referee to find the fact of a waiver. The contract related to one wing of a hotel, in which the defendant resided. He was not called upon to desert his residence, and was necessarily, as the referee expresses it, "about said work." And it is not pretended that the work in regard to which he gave specific directions was that in which the deficiencies are found to exist. It does not appear, and is not suggested by the referee, that the defendant ever waived the performance of the contract by the plaintiff. On the contrary, the evidence shows that he complained and remonstrated in regard to some departures from, and violations of, the contract which are to be presumed to be a portion of those found by the referee. And, indeed, the referee himself finds that the plaintiff refused to do certain things called for by the contract, although expressly requested by the defendant to perform his contract in those particulars. There is no ground upon which this recovery can be sustained, upon this finding, without violating the fundamental principles of the law of contracts.

It being necessary to reverse the judgment upon the merits, there is no necessity of examining the numerous exceptions taken by the defendant in the course of the trial.

Judgment is reversed and new trial ordered, costs to abide the event, and a new referee to be appointed.

*Judgment accordingly.*

## BOARD OF EXCISE OF MARION v. TURK, appellant.

*Justice's court — absence of plaintiff at rendition of verdict.*

At a trial before a justice of the peace, the verdict of the jury, in favor of plaintiff, was received by the justice and entered in the absence of the plaintiff. *Held*, that a judgment for plaintiff was erroneous and that the defendant could take advantage of the error.

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the plaintiff should have procured a statement of that fact in the return, after its attention was specifically called to the alleged error by the application for the amended return. In ordinary language used in legal proceedings, a statement that the party does not appear is a statement that he appears neither in person nor by attorney, and we must so interpret it in this case, in the absence of any explanation or any thing to cast any doubt upon the meaning of the return. The objection is necessarily fatal to the judgment.

The judgment of the county court and of the justice is reversed.

*Judgment reversed.*

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PERRINE v. HOTCHKISS, appellant.

*Statute of limitations — Mutual accounts — Costs on appeal.*

In a complaint were set up as causes of action numerous promissory notes made by defendant and held by plaintiff, and in the answer, promissory notes made by plaintiff and held by defendant. *Held*, that such notes did not constitute a "mutual, open and current account" within § 95 of the Code, so as to prevent a part being barred by the statute of limitations. The provision in § 95 was not intended to embrace mere cross demands, but only a mutual, open and current account that is unliquidated.

By a mutual mistake of the parties and referee, as to the date, one of the demands of the appellant which he was entitled to, was not allowed. As soon as it was discovered, respondent offered to deduct from the judgment in his favor the amount of the demand. *Held*, that the respondent should not be charged with costs of appeal by reason of the mistake.

APPEAL from a judgment for plaintiff entered upon the report of a referee. The facts appear in the opinion.

Oscar Craig, for appellant, cited, upon the question as to whether the demands of defendant were barred by the statute, *Helms v. Otis*, 5 Lans. 137; Cowen's Treat., § 733; *Tucker v. Ives*, 6 Cow. 195; *Kimball v. Brown*, 7 Wend. 325; *Chamberlin v. Cuyler*, 9 id. 128; *Edmondstone v. Thomson*, 15 id. 554; *Peck v. N. Y. & L. Steamship Co.*, 5 Bosw. 226; *Smith v. Ruecastle*, 2 Wm. Halst. 357; *McLellan v. Crofton*, 6 Greenlf. 309; *Knipe v. Knipe*, 2 Blackf. 340; *Chambers v. Marks*, 25 Penn. St.; *Mandeville v. Wilson*, 5 Cranch, 151; *Ord v. Ruspini*, 2 Esp. 569; *Stickney v. Eaton*, 4 Allen, 108; *Bass v. Bass*,



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8 Pick. 187; *Dickinson v. Williams*, 11 Cush. 258; *Shattuck v. Shattuck*, 16 N. H. 242; *Green v. Ames*, 14 N. Y. 227; *Blanch. on Limit.* 88; *Webber v. Twill*, 2 Saund. 127, note *b*; *Tillinghast's Ballat. on Limit.* 70; *Ang. on Limit.* (May's Ed.) 140; *Gregory v. Thomas*, 20 Wend. 17; *Waydell v. Luer*, 5 Hill, 448; *Cole v. Sackett*, 1 id. 516; *Hill v. Beebe*, 13 N. Y. 562.

*J. H. Camp*, for respondent.

TALCOTT, J. The action is brought upon sundry notes and for money lent and advanced, and property sold and delivered. The claims of the plaintiff are specifically set forth in different counts in the complaint. To a portion of these demands the defendant set up in his answer the statute of limitations as a defense; as to others, he denied the indebtedness; and he also set up, by way of set off, claims against the plaintiff for goods, etc., sold and delivered, money lent and advanced, and claims, described as "divers bills of exchange and promissory notes." As to so much of the defendant's answer as was set up by way of set-off or counter-claim, the plaintiff, with a general denial, replied the statute of limitations. The referee has disallowed sundry of the claims of the plaintiff as being barred by the statute of limitations, and also sundry claims of the defendant upon certain notes made by the plaintiff, upon the same ground. And the principal question made on this appeal is as to whether the notes of the plaintiff held by the defendant were properly disallowed by the referee, in making up and stating the balance found due to the plaintiff.

The appellant's counsel claims that the notes held by the defendant, and thus disallowed, are protected from the operation of the statute of limitations by the ninety-fifth section of the Code, relative to a balance due on a mutual, open and current account. One answer to this is, that there appears to be no evidence that the said notes were entered in or constituted a part of any account whatever, and the referee has found, as matter of fact, that none of said exhibits (the notes in question) formed a part of a mutual, open and current account existing between the defendant and said plaintiff. The exception in the statute made by section 95, referred to, does not and was not intended to embrace mere cross demands. The items which are saved by the statute must constitute a part of an actual account, which must not only be mutual, but open and current — that is, unliquidated.

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The doctrine of the authorities, as laid down by Mr. Angell, is that, even upon the liquidation and statement of a balance, the account ceases to be open within the meaning of the statute: "And thus ascertained the balance ceases to be an account, and has lost the peculiar attributes of an account; what was before an implied promise to pay what was reasonable, by such liquidation and stating of the account at once becomes an express promise to pay a sum certain." Angell on Limit., § 150, and cases cited. Promissory notes, bonds, etc., are not only evidence of a balance liquidated and adjusted, but express obligations to pay specific sums, and do not fall within the reason or spirit of that provision of law applicable to "mutual, open, current accounts." Each one of such obligations stands by itself as a separate cause of action, and as many actions may be brought on them as there are obligations, whereas one account cannot be split up and constitute the basis of several actions. Such obligations, even if entered in an account, do not constitute a part of it, so as to be saved by the exception. Bacon's Abr., Lim. of Actions, E, 3; *Ramchander v. Hammond*, 2 Johns. 200; *Toland v. Sprague*, 12 Pet. 300.

Among the claims of the plaintiff were claims for peppermint oil, sold and delivered by the plaintiff to the defendant. At the time of the delivery of the oil the defendant had a banking office called "The Hotchkiss Peppermint Planters' Banking House." When the oil in question was delivered to the defendant, Cavendar, one of his employees, whose business it was to receive the oil, received it and gave receipts therefor, for which purpose he used blank forms of certificates of deposit for money, by filling in the blank space, left for the insertion of the amount of money deposited, with the amount of oil received from the plaintiff from time to time, so that the receipts for the oil of peppermint purported to certify that the plaintiff had deposited so much peppermint oil in the Hotchkiss Peppermint Planters' Banking House, subject to his order on the return of the certificate. And the receipts were signed by Cavendar in the place intended for the signature of the cashier of the bank, and opposite the printed word "cashier," so that they appeared to be signed by Cavendar as cashier. Cavendar was not the cashier of the bank. And it appears pretty clearly from the evidence that these receipts were intended for no other purpose than as memoranda and acknowledgments of the amount of oil from time to time delivered by the plaintiff to the defendant. The

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defendant now claims that these receipts import a bailment and not a sale, and objects that their effect could not be changed by the parol evidence.

It is not necessary to examine the question thus presented, for various reasons. The claim for the peppermint oil allowed by the referee is set out in the eighteenth count of the complaint, and is there counted upon as a sale and delivery upon a *quantum meruit*, and it is averred that the oil was reasonably worth the sum of \$2.75 per pound. The answer of the defendant to the said eighteenth count of the complaint is, in substance, that he purchased the oil of the plaintiff under an agreement that he (the defendant) was to send the same to Liverpool for sale, and was to pay the plaintiff therefor the net amount realized from the sale in Liverpool, after deducting all charges and expenses, so that the only issue as to the peppermint oil which was made between the parties, by the pleadings, was not whether there was in fact a sale and delivery, but as to the price to be paid. And on this question the referee heard the conflicting evidence, and has found from it that the agreement as to the price was in fact that the defendant should pay for said oil as much per pound as any other person should get for his oil in that vicinity that season, and has fixed the price allowed, upon that basis.

Besides this, it was conceded that the defendant had sent this oil to Liverpool, and there sold and disposed of the same and converted it to his own use, long before this action was commenced. If the deposit receipts are to be taken literally as conclusive evidence of the contract between the parties, then this was an unlawful conversion of the property by the defendant; and he cannot set up his own wrong in answer to the action. In such a case the owner may, at his option, waive the tort and bring *assumpsit*, and since it appeared that the defendant had put it out of his power to return the property, the conversion was sufficiently evidenced without a demand and refusal. Moreover, the evidence showed that the defendant had repeatedly recognized his obligation to pay for the peppermint oil, after the conversion, and that the question between the parties was how much he should pay. It appears, therefore, to be clear that, upon the pleadings and evidence, the referee was entirely correct in holding the defendant liable for the oil as for oil sold and delivered.

The foregoing views cover the questions of law which have been

presented for our consideration. As to the findings of fact complained of, we are unable to discover but what there was evidence before the referee sufficient to authorize them. And, besides, the case does not purport to state the whole evidence, in which case we must presume that the evidence was sufficient to sustain the findings.

On the argument of the appeal it was conceded, by both counsel, that the defendant's exhibit No. 24 was disallowed by the referee through the inadvertence of the referee and the counsel for both parties, it having been assumed to be dated in 1860, instead of 1861, its true date. When the defendant's counsel prepared the case this exhibit was stated to be dated May 7, 1860, with a statement that the exhibit was to be inserted. When the case came to be printed as settled, and the exhibit inserted, the mistake as to the date of the exhibit was discovered, and the respondent's counsel, before the appeal was brought to argument, by a notice in writing, offered to allow the defendant the amount called for by this exhibit, with interest from May 7, 1860, by deducting the same from the judgment. The offer was not accepted. The error in applying the statute of limitations to the note in question was not specifically pointed out in the exceptions to the report. And it is apparent that the counsel for both parties, as well as the referee, assumed the note to have been dated in 1860 instead of 1861. It was agreed, on the argument of the appeal, that the amount of the note, viz., \$100, with interest from the 7th of May, 1860, should be deducted from the judgment in order to rectify the error. We think, under the circumstances, the respondent should not be charged with the costs of the appeal on account of this mistake.

Judgment modified by deducting therefrom \$100, with interest from May 7, 1860; as thus modified, affirmed with costs of appeal to respondent.

*Judgment accordingly.*

## KENDALL v. HOLLAND PURCHASE INSURANCE COMPANY.

*Fire insurance — conditions in policy — notice of loss — Agency.*

A policy of insurance against fire contained a condition that persons sustaining damage by fire "are forthwith to give notice thereof to the company." The insurance was effected through an agent of the company located in a town adjoining that in which the insured property was situated. The policy was issued through him, and contained an indorsement of his name, as agent, placed thereon by the company. *Held*, that notice of loss to such agent was notice to the company, and this was not affected by the fact that he was authorized to do business only in the town where he was located, such fact not being known to the holder of the policy.

The provision in question imposed upon the insured no more than due diligence under all the circumstances of the case.

MOTION by defendant for a new trial on exceptions taken at the Cattaraugus circuit, and ordered to be heard in the first instance at general term. The facts appear in the opinion.

*Hudson Ansley*, for plaintiff.

*George Bowen*, for defendant.

TALCOTT, J. This is an action on two policies of insurance. The first policy insured the sum of \$400; the other the sum of \$600. The policies were on two separate buildings, and the case comes here on exceptions ordered to be heard at the general term in the first instance. The policies contained the condition that persons sustaining loss or damage by fire, "are forthwith to give notice thereof to the company, stating the number of their policy." The main question in the case arises upon this condition. The office of the company is located at Batavia, in the county of Genesee. The buildings, however, were situated in the town of Redhouse, in the county of Cattaraugus, where the plaintiff resides. F. B. McAvoy is an agent of the defendant, residing at Otto, a town adjoining the town where the plaintiff resides, and where the insured buildings were situated.

The applications for the policies in question were received by said McAvoy, and by him forwarded to the company. Forthwith after the loss, the plaintiff gave information thereof to McAvoy, who

went with the plaintiff to the place of loss and there examined the matter. The preliminary proofs were subsequently served on the defendant. No question is made but what the preliminary proofs were in due form, and duly and properly served on the company. When the policies were issued by the defendant, each contained the indorsement placed thereon by the company, "F. B. McAvoy, agent, Otto, N. Y." McAvoy stated as a witness, that he was a local agent for the company, authorized, as we understand his testimony, to receive applications for insurance in the town of Otto, but not in the town of Redhouse. It did not appear that the defendant had any agent in the town of Redhouse, nor did it appear that the plaintiff had any notice of any limitation upon the agency of McAvoy. No objection was made to the form of the notice to McAvoy, but only that notice to him was not sufficient, the defendant claiming that notice should have been given at the office of the company in Batavia. McAvoy received the notice and went with the plaintiff to examine the premises, without any suggestion of any want of authority, or that the premises were outside of his jurisdiction, or that notice should be sent to the office of the company or given to any other agent. The company could only act or receive notice through some officer or agent, and we think the indorsement on the policy, that McAvoy was agent, was notice to the plaintiff that he might treat him as such, and that communications concerning matters arising under the policies might be made to him as such. Having no notice of any limitation upon McAvoy's powers the plaintiff was not bound by any such limitation. The question is not so much what authority the agent in point of fact had, as it is what powers persons had a right to suppose he possessed, judging from his acts and the acts of his principal.

In *Lightbody v. N. A. Ins. Co.*, 23 Wend. 18, it was held that an insurance company was bound by the acts of an agent outside of the places within which he was authorized to act, where the assured had no notice of any restriction to particular limits.

The provision in the policy under discussion is construed as imposing no more than due diligence under all the circumstances of the case. *Inman v. Western Ins. Co.*, 12 Wend. 452.

There was no error in excluding the opinions of Litchfield and Oakley as to the value of the buildings; neither was an expert, and the testimony of each, tended to show that he had not sufficient

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knowledge of the subject and the facts to render his opinion of any value.

The defendant claimed the right to have the question of the amount of damages which the plaintiff was entitled to recover submitted to the jury, without calling the attention of the court to any thing in the evidence which he claimed called for the submission of this question. All the witnesses on the subject had fixed the value of each building at more than the amount insured thereon, except one, Sheldon Ware, who said of the smaller building, upon which the insurance was \$400, that it was worth "about \$300 or \$400, perhaps." And the defendant's counsel now claims, that by reason of this expression of the witness, the question whether the smaller building was worth \$400 was left in such uncertainty that it ought to have been submitted to the jury. We do not think the expression of the witness amounted to, or was intended as, any contradiction of the other witnesses. And, at all events, the counsel should have called attention to it if he thought it had any such effect.

The form in which the request was made was calculated to mislead the court, and not to inform it that the defendant's counsel claimed that there was any evidence that the value of the smaller house was less than the amount insured upon it. On the whole we think there is no occasion to order a new trial, and the motion must be denied and judgment ordered for the plaintiff on the verdict.

*Judgment accordingly.*

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JENNINGS *et al.* v. WHITEMORE *et al.*, appellants.

*Partnership — conspiracy of one partner with third party — Equitable relief — Parties — Evidence — former judgment.*

E. and W. conspired to have a debt owed by E. to W. paid with the assets of a firm in which E. was co-partner, and E. gave W. the firm note for that purpose. W. began an action upon the note, and procured an attachment against the firm property. Plaintiffs, who were the remaining members of the firm, began an equitable action, setting forth the above facts and the insolvency of the firm, and asking that such firm be dissolved, a receiver appointed, an accounting had, and that W. be restrained from interfering with the partnership effects, and that his attachment be declared a lien upon the interest of E. only. *Held*, (1) that an objection that plaintiffs had an adequate remedy at law could be taken only by demurrer or answer; (2) that

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plaintiffs were entitled to the relief demanded; (8) that W. was a proper party defendant.

In the complaint plaintiffs set up the pendency of the action by W. against the firm. In that action the plaintiffs in this action defended, and were successful. *Held*, that the judgment in the first-named action was admissible in evidence at the trial of this action.

APPEAL from a judgment entered at the Oswego special term on a trial by the court in an equity case. The facts appear in the opinion.

*J. A. Hathway*, for appellant.

*D. Baldwin*, for respondents.

TALCOTT, J. The plaintiffs, Jennings and Trowbridge, were in copartnership with the defendant Ellicott. The defendant Whittemore conspired with Ellicott to have Ellicott give him a note, purporting to be the note of the firm, for a debt due from Ellicott alone, with a view of levying the amount out of the copartnership assets. Ellicott made the note, and then absconded temporarily, so that Whittemore was enabled to, and did commence, a suit against the firm on the note, and seized the partnership effects upon an attachment. Whereupon the other partners, Jennings and Trowbridge, commenced this action, against Wittemore, Ellicott and the sheriff who served the attachment, setting forth substantially the facts above stated, and that the copartnership was insolvent, and asking that it be dissolved and a receiver appointed, and for an accounting between the members of the firm; that Ellicott and Whittemore be restrained from disposing of, or meddling with the property and effects of the firm during the action; that it be determined whether the attachment was a lien on the partnership property, or only on the interest of Ellicott, and for other relief. The defendants answered, and the complaint was dismissed as to the sheriff, Tucker, but judgment was rendered as to the other defendants. What judgment was rendered does not appear from the present case. Whittemore appealed from the judgment, and it was reversed and a new trial granted by the general term of the fifth district, upon what grounds does not appear. The cause was tried again and a judgment rendered, from which the present appeal is taken. The decree is to the effect that the note for \$1,500 was



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made by Ellicott for his own individual benefit, without the knowledge or consent of his copartners, and that such fact was known to Whittemore when he took the note. And it is further decreed that the copartnership be dissolved, that a receiver of the effects be appointed, and that the note of \$1,500 be treated as the individual debt of Ellicott, and not as a debt of the firm.

It appears that during the progress of this suit, the suit in which the attachment was issued went to trial, and the present plaintiffs, Jennings and Trowbridge, successfully defended against that suit on the ground of infancy. What questions were designed to be presented on this appeal is not very apparent. No exceptions were filed to the decision of the special term. The case contains only two exceptions: one on the denial of a general motion for a nonsuit without any specification of any ground, and the other, an exception to the admission in evidence of the judgment roll in the action commenced by Whittemore against the three partners, upon the ground that it is not within the pleadings. The motion for a nonsuit was probably unavailable to raise any question. *Binsse v. Wood*, 37 N. Y. 526; *Webb v. Odell*, 49 id. 583. The objection to the admission of the judgment record was frivolous. The action was commenced and was pending when this suit was commenced, and the fact of its commencement was alleged in the complaint, and put in issue by the answer of Whittemore. The fact that after issue joined in this suit the former action had proceeded to judgment did not debar the plaintiffs from proving it, and the record was the proper evidence of it. The points presented by the counsel for the appellant seem to be founded upon the idea that the plaintiffs were not entitled to any decree to the effect that they were not, and the partnership assets were not, bound by the \$1,500 note, upon the ground that, so far as that is concerned, the plaintiffs had an adequate remedy at law. If this question had been raised by any proper exception to the decision, it would not be available in this case. The objection that there was an adequate remedy at law was not taken by demurrer or answer. By answering, without objection that there is an adequate remedy at law, the defendant submits his defense to the cognizance of the court. And the court of equity will, in such cases, retain the cause, provided it has jurisdiction of the subject-matter and is competent to give relief. 2 Paige, 509; 3 id. 313; 11 id. 596. The objection that the plaintiff has a remedy at law cannot be made at the hearing, if not set up in the answer.

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*Truscott v. King*, 6 N. Y. 147. But the plaintiffs had an equitable title to relief, as against Whittemore as well as Ellicott, upon the allegations of their complain. Whittemore was attempting to reach and convert the assets of the firm on a debt due from Ellicott alone, under color of the false and fraudulent pretense that the debt was due from the firm, and was a lien on the assets of the firm. The partnership was insolvent, and the acts of Ellicott and Whittemore in furtherance of the attempt to appropriate the effects of the firm, to the payment of the individual debts of Ellicott, were a fraud against the other partners and against the creditors of the firm. The other partners had a right to have an account taken, a receiver appointed, and the assets of the firm appropriated to the firm creditors, and to a suit for this purpose; Whittemore, who, by his fraudulent note and attachment, was conspiring with Ellicott to divert the copartnership assets from the payment of the partnership debt, was a proper party. The fact that the plaintiffs had a defense at law, against the note, did not deprive them of the right to have an injunction, receiver and account in equity. We see nothing in the judgment in this case, of which, assuming the facts to have been correctly found, the defendant Whittemore can have any just cause to complain.

The judgment must be affirmed, with costs of the appeal to be paid by defendant Whittemore.

*Judgment accordingly.*

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REED, appellant, v. ABBEY.

*\* Contract — construction of — Sale.*

Plaintiff delivered to H. some sheep under this agreement: "July 8, 1869 I have taken of A. E. R. twenty-nine sheep and twelve lambs, to be returned on the 1st of September, 1871, \* \* said sheep to be returned as good and in as good condition and age as when taken." *Held*, a sale and not a bailment of the sheep.

APPEAL from a judgment for the defendant on the report of a referee. The facts appear in the opinion.

*Geo. Bullard*, for appellant.

*M. H. Peck*, for respondent.

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TALCOTT, J. This was an action for the wrongful conversion of twenty-nine sheep and twelve lambs. The defendant had purchased the sheep of one George Hix. Hix had received the sheep of the plaintiff upon the following agreement, viz.:

“ALBION, July 8, 1869.

“I have this day taken of Abbey E. Reed twenty-nine sheep and twelve lambs, to be returned on the first of September, 1871, in consider of 1 lb. of wool per head annually, said sheep to be returned as good, in as good condition and age as when taken.

“GEORGE HIX.”

The sole question in the case is whether this arrangement constituted a bailment or a sale. If the import of this arrangement was that the said sheep were to be specifically returned to the plaintiff at the expiration of the term of hiring, then no title passed to Hix. If on the other hand, Hix had the right to substitute other sheep to replace those taken, when the arrangement terminated, then, as is well settled, the title passed to Hix and he became liable, upon his contract, to return the same or an equal number of sheep of the same quality, condition and age, at the expiration of the term specified.

Agreements, very similar to the one under consideration, have heretofore been construed by the courts. The one most nearly resembling this is that which came up for construction and interpretation in *Carpenter v. Griffin*, 9 Paige, 310. There a party had leased a farm, together, with certain farming tools, and some cows and sheep, then on the farm. The question was, as to the title to certain of these cows, as between the lessor and an execution creditor of the lessee. All the property, real and personal, was demised and let in the ordinary form, but, in regard to the cows and sheep, the lease contained the following provision: “Cows of equal age and quality to be returned at the end of said term; also, the sheep.” It was held by the court, that notwithstanding the general provisions and terms of the lease, which imported a mere letting, yet that, by reason of the expressions referred to, the title to the thirty cows passed to the lessee, upon the execution of the lease, the chancellor saying: “In the present case, the stipulation in the lease is to return, at the end of five years, cows of equal age and quality, which necessarily excludes the idea that the identical cows

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put on by the landlord were to be returned at the expiration of the term, for those cows could not be of equal age, although they might be of equal value."

This decision has always since, so far as we are advised, been recognized as sound law. And we think it must control the present case. True, in the present case, the words are not identical. The language in the present case is, that the sheep are to be returned as good, and in as good condition and age as when taken. The sheep were let for two years and a quarter. It is manifest that these same sheep could not be returned in as good age after the expiration of that time as when taken. The use of the expression to be returned, in such contracts does not necessarily mean that the identical thing referred to is to be returned. It is not uncommon to use this expression when it is not understood that the identical thing is to be returned, but when on the contrary it is understood that the thing borrowed is to be consumed, but replaced at a future time with similar articles. If the intention of the contract was that the identical sheep leased were to be returned, then the stipulation in respect to their age was wholly absurd. The lessee could do nothing and effect nothing in reference to the age of these sheep, yet he is made to stipulate concerning the ages of the sheep to be returned. And if we adopt that interpretation of the contract which requires the identical sheep to be returned at all events, then the effect of the stipulation as to age is, either that two and one-quarter years shall amount to more than two and a quarter years, or less than that period, either of which supposition would be senseless.

On the whole, we think that the referee interpreted the contract correctly, namely, that the intention of the agreement was that Hix should at the end of the term deliver to the plaintiff, the same number of sheep and lambs, of as good quality, in as good condition, and of substantially the same age as those he received. If this be the true interpretation of the agreement, then the legal title passed to Hix, and the purchase by the defendant from Hix, and the subsequent sale by the defendant, did not constitute a wrongful conversion. *Carpenter v. Griffin*, *supra*; *Wilson v. Finney*, 13 Johns. 358; *Hurd v. West*, 7 Cow. 752; *Smith v. Clark*, 21 Wend. 83; *Norton v. Woodruff*, 2 N. Y. 153; *Story on Bailm.*, §§ 370a and 439.

The judgment must be affirmed.

*Judgment affirmed.*

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People v. Howe.

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## PEOPLE V. HOWE.

2 T&C383  
83 AD 233*Embezzlement — indictment for — what does not constitute.*

An indictment charged defendant with embezzling a specified sum and converting the same to his own use. Evidence was given showing that defendant had received for premiums due an insurance company for which he procured applications, various sums, at various times from different individuals, a part of which he had paid over, and that the sum charged in the indictment was the balance due from him. The embezzlement of any particular sum or specified money was not shown. *Held*, that the charge was not sustained.

Defendant procured a number of applications, giving credit and taking notes for a portion of the premiums. The company, knowing this, issued the policies applied for and charged the premiums due to the account of defendant. Defendant collected from the policy-holders small sums at various times, until he had obtained the whole amount of the premiums. A part of this he had sent in various sums to the company, which sums had been received from him on account. *Held*, that the failure to pay the balance did not constitute embezzlement.

CERTIORARI to the general sessions of Yates county bringing up a record of conviction and bill of exceptions. The defendant was convicted of embezzlement, upon substantially the following state of facts:

The defendant was an agent for an insurance company to receive applications and premiums, advise the company thereof, and when the company approved of the risk and executed the policy, to deliver over such policy. The defendant sometimes received notes, and sometimes gave more or less credit for the premiums. He was to pay over the premiums to the company after they were received, in case the company accepted the risk.

The defendant had been acting as such agent for a number of years; the company had kept an account with him and he had furnished it security for any balance which might be due from him to the company. In November, 1870, a committee on the part of the company had a settlement with the defendant, at which it seems the defendant was found indebted to the company in a considerable balance, and on that occasion, certain notes, signed by one Davis, apparently for the benefit of the defendant, were given to and accepted by the company in payment of the balance then due, except a small amount of about five dollars.

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**People v. Howe.**

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Thereupon a new arrangement was entered into between the company and the defendant, under which it was agreed that the defendant should take applications and forward them to the company with the money for the premium with each application, and the company was to underwrite the policies applied for if it saw fit, if not, to return the amount of the premium.

The compensation of the defendant for doing the business was to be twenty per cent on the amount of the premiums, which he was to deduct from the premiums. In the winter of 1871, the defendant procured a number of applications for insurance with the company, giving credit in some cases for the premiums, in other cases taking notes. These applications amounted to thirty-one, in all, and were forwarded by the defendant to the company. With these applications the defendant forwarded a draft for \$30. The letter accompanying the applications and draft contained the following postscript: "P. S. I expected to have forwarded at least \$100, at this time, but failed to get it, so I forward what I have. Shall be forwarding more immediately after first of April, as I shall then pass over territory again."

The letter also requested the company to forward the accepted policies to the applicant as fast as the defendant sent forward the money.

The letter did not state, nor did it appear in the case from whom the \$30, covered by the draft remitted, had been received, or to what policies it was applicable. Soon after the receipt of these applications and the draft, the directors of the company sent their general agent to the defendant with some general instructions to collect the money on these applications, or to take away Howe's agency. The agent applied to the defendant for the money on all these applications, but the defendant claimed it had not been fully collected, and the case does not show how much of it had then been collected, and does not show that any of it had been collected, except by the general admission of the defendant to the effect that a part of it had been collected.

At that time, the balance which would be due the company for the amount of premiums on the whole thirty-one policies, was agreed upon and stated to be, less the defendant's commissions and a returned premium, \$314.86, and also a balance on previous business, of \$25.24.

An arrangement was subsequently made by the company, by

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People v. Howe.

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which it was agreed that the company should issue the policies in question, and charge the premiums over to the defendant.

This was done, and an account current of the transactions between the defendant and the company kept and rendered. And the defendant sent a draft to the company on account of premiums on those applications which was receipted as "upon his account with this company."

Sometime in August, 1871, the defendant admitted that he had received the full amount of premiums, but had used the unpaid balance to pay on a mortgage.

The premiums received by the defendant were received in different amounts from different persons, at different times, in different places, and upon different accounts. Besides the draft for \$30, remitted with the applications, the defendant had remitted by drafts, \$50, in a gross sum, which was so received and credited on account.

The only direct evidence of the receipt of money by the defendant for premiums on these applications was of the receipt of \$31.90, in three different sums, from three different parties, but whether paid at the times of their respective applications for insurance, or afterwards did not appear. The prosecution also proved the receipt of one note by the defendant for one of these premiums, but whether the note had been paid or not did not appear otherwise than from the general admission of the defendant in August, 1871, that he had received the premiums.

The indictment contained one count charging the defendant with receiving and taking into his possession the sum of \$238.08 [that being the balance of account claimed to be due from the defendant to the insurance company], and feloniously taking, embezzling, carrying the same away and converting the same to his own use.

*H. Struble*, district attorney, for the people.

*Ralph T. Wood*, for defendant.

TALCOTT, J. The conviction in this case seems to have taken place under an entire misconception as to what constitutes the crime of embezzlement, the mode in which it is to be charged, and the evidence by which it is to be established.

The defendant was evidently indicted not for embezzling any specific thing or sum, but for embezzling a balance of account,

namely, the amount due to the insurance company on a net balance, consisting of numerous smaller sums of money, received at different times and in different places, from different persons and on different accounts. This will not answer. Each specific act of embezzlement is a specific offense, and must be so charged with all necessary certainty and particularity, to enable the defendant to understand and prepare to meet the specific charge. It may be that if a servant should have, at one time, in his own possession, a gross sum belonging to his master, though received from different parties, at different times, and, having it all in possession, should then form the design to feloniously appropriate the gross sum, and do so, he might be indicted for embezzlement of the gross sum without specifying the sources from which received, or in any way undertaking to particularize the various amounts of which it was composed. It is sufficient to say that the evidence in the case at bar makes out no such case. The principles applicable to such an indictment are stated by Mr. Bishop, in his very elaborate and learned work on Criminal Law, as follows: "On common-law principles the indictment, under the statute, must set out, specifically, some articles of property embezzled. An allegation that the prisoner took and received on account of his master divers sums of money, to wit: the sum of £10, and afterward embezzled the same, not being sufficient. In other words, the indictment must describe, according to the fact, some of the identical goods or money, so the evidence must establish the embezzlement of the specific articles described." 2 Bish. Crim. Law, § 374 and cases cited.

Certain statutory provisions have been made in England with a view to simplify the forms of indictment in such cases. See a reference to these statutes, 2 Bish., § 375, note 1. But, as stated by the author on common-law principles, a statute providing a simpler form of indictment does not change the nature of the offense, or diminish the quantity or modify the species of proof, and even now, in England, it will not suffice to show a general deficiency in account. Some specific sum must be proved to have been embezzled, the same as in larceny, some particular article must be proved to have been stolen. The Course adopted in the case at bar, subjects a party to be required to meet any number of distinct offenses under one count in the indictment, and to a conviction, if any one, of a hundred distinct offenses sought to be proved should be found to be established.



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Therefore the counsel for the defendant was authorized to object, as he did, to the evidence tending to prove the receipt of various sums of money from various persons, at different times, and upon different accounts. The specific offense of embezzling the particular sum received from either of the witnesses, had not been charged in the indictment, nor was any kind of description or identification of any money embezzled attempted to be given. But a fundamental error, touching the merits of the case, which was committed in the court below, was in the various rulings, by which it was held that the defendant could be convicted of embezzlement on the facts as they appeared on the part of the prosecution. It is manifest that it was not understood by the parties, that the specific and identical money received by the defendant, from time to time, from the various insured parties was to be handed over to the company, but it was to, and did, become a matter of account, and the prosecution is in fact for not paying over a balance of account. This is not the object, nor within the intent of the statutes, against embezzlement. Those statutes were passed to remedy a defect in the common law as regards the crime of larceny, it being held that a larceny must include a trespass, either actual or constructive, consequently if the property or money misappropriated came to the possession of a servant lawfully, in general, the subsequent misappropriation of it could only be treated as a breach of trust, and not punishable criminally. And it was to avoid the difficulty arising out of the lawful possession of the party sought to be punished, which prevented a conviction for larceny, that the new offense was created. The same title and right to receive the identical money must exist, in order to a conviction for embezzlement, as in the case of larceny. It has, therefore, been held, where the party receiving the money has a right to mix it with his own, being accountable for a balance, as in the case of an auctioneer (*Commonwealth v. Stearns*, 2 Metc. 343), or a newspaper collector (*Commonwealth v. Sibly*, 11 id. 64), that an indictment for embezzlement does not lie upon a misappropriation. However morally wrong it may be for a party to use money for his own benefit, which he is bound to pay over to another, it is not a criminal offense so long as it is a mere debt, no matter of how sacred a nature.

Since the facts in this case transpired, and in 1873 the legislature passed an act relative to the defalcations of agents of insurance companies, which, it may have been supposed, would render such

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agents liable to be proceeded against criminally for not paying over a balance of account to their principals. Whether it will have such an effect it will be time enough to determine when the question arises.

The questions discussed hereinbefore were sufficiently presented, in various ways, by the exceptions taken on the trial; and we are of the opinion that it is clear the conviction cannot be sustained, and that the defendant cannot lawfully be convicted on the indictment and the evidence.

The conviction is therefore reversed, and the proceedings remitted to the court of general sessions of Yates county, with directions to discharge the prisoner.

*Ordered accordingly.*

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SHRAEF *et al.* v. UTICA AND BLACK RIVER RAILROAD COMPANY.

*Railroads — defective cattle guards — animals wrongfully on highway — Practice — exceptions first heard at general term.*

Plaintiff's horses escaped from the pasture into the highway, and went from the highway through a defective cattle guard maintained by defendant on to defendant's railway track, where they were killed by a passing train. Held, that defendant was liable for the value of the horses. The defendant was bound to guard against animals wrongfully as well as against those rightfully in the highway; and the negligence of plaintiffs in permitting the horses to escape would not bar a recovery.

Where exceptions are ordered to be heard, in the first instance, at the general term, nothing can be passed upon but the exceptions themselves.

THIS is a motion for a new trial by the defendant, on exceptions taken at the Oneida circuit, and ordered to be heard at the general term in the first instance. The facts appear in the opinion.

*J. A. Steele*, for plaintiffs.

*A. M. Beardsley*, for defendant.

TALCOTT, J. This is an action by the plaintiffs for the killing by defendant of a span of horses. The horses escaped from the pasture belonging to one of the plaintiffs onto the high-

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way, and thence, by reason of the insufficiency of one of the defendant's cattle guards, onto the defendant's track, where they were killed by a moving train of the defendant. The jury has specially found that the cattle guard was insufficient to prevent horses and cattle from getting across it onto the road. The only questions of any importance presented by the numerous exceptions and requests of the defendant's counsel may be summed up as follows : 1st. As to whether the defendant is required to fence and guard only as against animals rightfully in the highway; 2d. Whether the plaintiffs' negligence in suffering their horses to escape into the highway is a bar to their recovery. These questions are fully settled in favor of the plaintiffs by the court of last resort. *Corwin v. N. Y. & E. R. R. Co.*, 13 N. Y. 42, and 34 id. 427; 35 id. 641; 38 id. 433.

The defendant's counsel makes a point that the verdict is not sustained by the evidence. Even if there were any foundation for this point, it could not be considered here, as the case comes before us on an order that the exceptions be heard at the general term in the first instance. In such case, nothing is before the general term but the exceptions. As to the point that it was not shown that the plaintiffs were jointly interested in the horses, there was evidence on the subject. Sheaf, one of the plaintiffs, testified that the plaintiffs purchased the horses together; and although the statement of the other plaintiffs as to the mode in which, and for whose benefit, the horses were bought, was somewhat confused and unintelligible, yet the construction of the whole testimony together was properly left to the jury. The court fully and fairly instructed the jury on this point; and the exceptions to the refusal to charge, in the particular language of the defendant's counsel, cannot, in such a case, be sustained. None of the other exceptions seem to call for any remark.

A new trial is denied and judgment ordered for the plaintiffs on the verdict.

*Judgment accordingly.*

BARNES, appellant, v. BARRUS.

*Promissory note — indorser — notice.*

The indorser of a promissory note received this notice: "The note given to Sarah E. Barnes by George B. Hutchins for \$100, dated the 24th day of May, 1866, is this day due; that if the note is not paid by Hutchins, she (Mrs. Barnes) will hold you for the note." *Held*, not sufficient to charge the indorser.

APPEAL from a judgment for defendant on the report of a referee. The facts appear in the opinion.

W. A. Poucher, for appellant.

A. R. Willey, for respondent.

TALCOTT, J. This action is brought to charge the defendant as the indorser of a promissory note for \$100, made by one George B. Hutchins. The notice claimed to have been given to the indorser, and as found by the referee, is as follows:

"The note given to Sarah E. Barnes by George B. Hutchins for \$100, dated the 24th day of May, 1866, is this day due; that, if the note is not paid by Hutchins, she (Mrs. Barnes) will hold you for the note.

(Signed)

B. N. HINMAN."

Sundry objections are made to the form of this notice, and to its sufficiency. It is sufficient, however, to say that it contains no intimation that the note had been presented for payment and dishonored. The most latitudinarian doctrines on the subject of the sufficiency of notice of dishonor to charge an indorser will not excuse the omission of the information in some form, that the note has been presented for payment and payment has been refused. This information is the very gist and object of the notice. The referee was, therefore, right in holding that the notice was insufficient to charge the defendant as indorser, and the judgment is affirmed.

*Judgment affirmed.*

KINNE, appellant, v. KINNE *et al.* (1.)*Will—execution of—conflict in testimony.*

One of the subscribing witnesses to a will testified to the due execution of the will, while the other witness denied that all the statute requirements were complied with. *Held*, that the surrogate was justified in admitting the will to probate.

APPEAL from the order of the surrogate of Onondaga county, admitting to probate the will of Esop Kinne. The facts appear in the opinion.

*E. Butler* and *G. N. Kennedy*, for appellant.

*N. F. Graves* and *D. Pratt*, for respondent.

TALCOTT, J. The only question involved in this case is, whether the evidence was sufficient to authorize the surrogate to determine, as a question of fact, that the requisites to a due execution of a will, as provided by statute, were complied with.

According to the testimony of the witness, Brown, and as he recollects the transaction, they were not. If, however, the other subscribing witness, Shumway, has stated facts showing a compliance with the statute, the surrogate might, as he did, rely upon his testimony, and thus find the will to have been duly executed. *Trustees, etc., v. Calhoun*, 25 N. Y. 422; *Tarrant v. Ware*, id. 425.

That the will in question was signed by the testator is not disputed. It was not, however, so signed in the presence of the attesting witnesses. But this is not necessary, provided the testator acknowledged his subscription in the presence of the attesting witnesses. *Hoystradt v. Kingman*, 22 N. Y. 372.

It is not necessary to a due acknowledgment of the signature that it should be referred to in words. An acknowledgment that an instrument purporting to be a will, and purporting to be signed by the testator, is his will, is a sufficient acknowledgment of the signature. The acknowledgment of the signature and the publication, by acknowledgment of the will, may constitute one and the same act. *Baskin v. Baskin*, 36 N. Y. 416; *Willis v. Mott*, id. 486.

The testimony of Mr. Shumway on the point is as follows: "Mr. Kinne requested me to sign as one of the witnesses; I went and

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brought in Mr. Brown, the other attesting witness, from Sanders & Ludington's office; I asked him, is that your last will and testament? He said, 'Yes, I declare it so to be;'" and he further proceeds to say, that he left the testator in his, Shumway's, office, telling him he would go out and get the witness; that he came back and asked Mr. Kinne if that was his last will and testament; Kinne said it was, and then he, Shumway, signed it as a subscribing witness, and the other witness, Brown, also then subscribed it as a witness. We understand the testimony of Shumway to be, that the declaration of the testator that the paper was his last will and the signature of the witnesses were all parts of the same transaction, and that the signature of the subscribing witnesses was in the presence of the testator. The request of Shumway to Brown to subscribe as a witness, coupled with the conduct and acquiescence of the testator, was a sufficient request on the part of the testator that Brown should become one of the subscribing witnesses. It is true that the witness, Brown, now does not recollect, and perhaps intends to deny, some of the facts stated in the attestation clause signed by him. But his testimony is not more contradictory of the facts necessary to a due execution of the will than was that of Mrs. Quimby in the case of *Tarrant v. Ware*, *supra*, which, indeed, it much resembles. The language of the court of appeals in *Willis v. Mott*, *supra*, seems to be quite applicable in this case: "At any rate, it was a question of fact whether the requisites of the statute had been complied with, and upon this point the decision of the primary tribunal should be of controlling weight. If we entertained doubts of the correctness of the decision, which we do not in the present case, we should have great reluctance to reverse the decision of a surrogate upon a question of fact purely. He has had the benefit of a personal inspection of the witnesses, the opportunity of witnessing their manner of giving their testimony, and, in the case of a conflict, is better qualified than an appellate court to determine where the truth lies, and to whom credence should be given."

The order of the surrogate admitting the will to probate must be affirmed, with costs to the respondent.

*Order affirmed.*

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Kinne v. Kinne.

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KINNE v. KINNE *et al.*, appellants. (2.)*Trial — right to jury — Dower.*

In an action for admeasurement of dower, the defense was that plaintiff had by an ante-nuptial agreement, released her claim to dower. *Held*, that defendants were entitled to a trial by jury.

APPEAL from a judgment in favor of plaintiff in an action tried at special term. The action is an equitable one, brought by the plaintiff, as the widow of Esop Kinne, deceased, against his heirs and the executors of his estate, to compel the admeasurement and for the recovery of her dower in the real estate of which her late husband was seized.

The defendants appeared and denied that the plaintiff was entitled to dower in the premises described in the complaint as the widow of the deceased, and set up an ante-nuptial agreement by which the plaintiff was to receive \$1,000 after the death of her husband in lieu of dower.

The cause being at issue, was brought on for trial at a special term in the county of Onondaga, before Mr. Justice MORGAN. Before the trial was entered upon, the counsel for the defendants appeared and moved for a trial by jury, and insisted that the court could not legally try said cause without a jury, against the objection of the defendants.

The court denied the motion, and the defendants' counsel then and there duly excepted, and the trial proceeded before said justice without a jury, who, after taking the evidence offered by the respective parties, made a report in favor of the plaintiff in due form, and directed judgment for said plaintiff, declaring that she was entitled to dower in the said land of her late husband as therein described, and directing the admeasurement of such dower by three commissioners, to be appointed on proper application therefor, with costs.

*N. F. Graves and D. Pratt*, for appellants.

*Geo. N. Kennedy*, for respondents.

E. DARWIN SMITH, J. This case presents but a single question for our consideration. It is, whether the objection taken at the  
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beginning of the trial to the trial of said cause by the court without a jury was valid, and the exception to the decision of the judge at special term overruling such objection, and the defendants' motion for a jury trial, and proceeding to try said cause without a jury, was well taken.

Dower is unquestionably a strict legal right. It is an estate in land recognized and protected by *magna charta*, and primarily, in England, was assigned and recovered by proper proceedings in the courts of the common law. But the courts of equity, as early as in the reign of Queen Elizabeth, assumed a remedial jurisdiction over claims of dower. The earlier cases in which courts of equity entertained bills relating to dower were cases where the aid of the court was invoked, and necessary for the purposes of discovery and for the removal of impediments or frauds obstructing the assertion or establishment of the rights of the doweress in the courts of law; and, gradually, the courts enlarged their jurisdiction till they finally came to assert and exercise a concurrent jurisdiction with the courts of law, to give full relief where they had acquired jurisdiction for the purpose of discovery, or otherwise where the right of the widow to dower was not denied or contested.

But where the right to dower was controverted, the English courts of equity have uniformly held that the question of right must be tried at law. *Curtis v. Curtis*, 2 Bro. 633; *Mundy v. Mundy*, 2 Ves. Jr. 128; Parks on Dower, 329.

In *Mundy v. Mundy*, *supra*, the Lord Chancellor said that, "If a legal title, such as dower, is controverted it must be made out at law." Chancellor KENT asserted the same rule in *Swaine v. Perine*, 5 Johns. Ch. 488, and in 4 Kent Com. 72, following these English cases, as did Chancellor WALWORTH in *Badgley v. Bruce*, 4 Paige, 100.

In this last mentioned case the chancellor said the rule is that "if the title of the complainant is denied, the court will retain the bill and direct a suit at law to try the title, and will then give possession and decree such other relief as the plaintiff may be entitled to on the rights thus established."

Such was doubtless the rule and practice in the courts of equity in this State before the adoption of the constitution of 1846, by which legal and equitable jurisdiction was given to and united in the same court.

As this court under the constitution now possesses and exercises



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full and complete general jurisdiction, both in law and equity, this question has only the practical consequence that it affects the mode of trial.

The right of trial by jury, in all common-law actions and in respect to all legal rights, as it existed when our first State constitution was adopted, is retained in the present constitution (art. 5, § 2). It follows, I think, necessarily from these considerations that the defendant's claim and demand for a jury trial, made at the trial, was well founded, and that he could not be deprived of such right by the court. *Davis v. Morris*, 36 N. Y. 572; *Hudson v. Caryl*, 44 id. 553.

In the last entitled case the action was in equity to abate a nuisance and recover damages. The defendant claimed a trial by jury when the cause came on for trial, as was done in this case, which was denied and the trial was had by a judge without a jury. The judgment was reversed on this precise ground and the analogy between that case and this, it seems to me, is complete and perfect.

In a similar case of nuisance, in this department, we have recently held, in the case of *Parker v. Laney* 1 N. Y. Sup. 590, that, in such case, the issue must be tried at law, and the case then be brought on for a hearing at special term, for any equitable relief dependent upon, or incidental to, the determination of the jury, upon the main issues tried at the circuit, to which either party may be entitled.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

*Judgment accordingly.*

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MANUFACTURERS AND TRADERS' BANK OF BUFFALO V. FARMERS  
AND MECHANICS' NATIONAL BANK OF BUFFALO.

*Consignor and consignee — Bill of lading — Factors' act (laws 1830, chap. 179) — apparent owner — when acts of, bind true owner.*

A quantity of wheat was shipped by propeller from Milwaukee to Buffalo, consigned to W., and a draft made upon W. for the purchase price. To meet this draft, W. procured credit from the plaintiff, the M. bank, and assigned as security the bill of lading of the wheat. The draft was paid by plaintiff. Before the arrival of the wheat at Buffalo, W. agreed to sell it to N. Upon its arrival, W. took charge of it and placed it in an elevator connected with the

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Erie Railway. On the same day, W. gave N. an order for the wheat, N. promising to pay for it the next day. N. took possession of the wheat, shipped it by the Erie Railway to New York, consigned to a firm there, and took a bill of lading, in which it was stated that the wheat was subject to the order of defendant, the F. bank. Upon the delivery of this bill, defendant, in good faith, discounted a draft by N. upon the consignees in New York. In an action against defendant for the conversion of the wheat, *Held*, that the provisions of the factors' act (Laws 1880, chap. 179), did not apply to or include defendant, who was not a consignee or factor of N. Said act only applies to consignees named as such in the bill of lading. *Held*, also, that W., being the general owner of the wheat, his acts bound the plaintiff as to those dealing with him in good faith and without notice. W. having clothed N. with the apparent ownership of such wheat, and thereby enabled him to obtain credit from defendant, plaintiff could not recover for the conversion of the same.

THIS is an action of trover for the conversion of 15,000 bushels of wheat. The cause was tried at the circuit in Erie county, where a verdict was found for the plaintiff in the sum of \$23,793.66, and the case ordered to be heard upon exceptions at the general term in the first instance, and judgment in the meantime suspended.

*John Ganson*, for plaintiff.

*W. W. Green*, for defendant.

E. DARWIN SMITH, J. The questions presented for our consideration in this case arose upon, and are limited to, the exceptions taken at the circuit.

The first exception arises upon the defendant's motion for a nonsuit at the close of the plaintiff's case.

The defendant's counsel stated at the time two grounds for such motion:

1. That the plaintiff had no property in the wheat, and,
2. That the demand was not accompanied by any evidence of the plaintiff's right to the possession. The motion was denied, and the counsel duly excepted.

At this stage in the trial the plaintiff had proved that the wheat in question was purchased at Milwaukee on the 8th of November, 1871, by the firm of George Jones & Co., for S. K. Worthington of Buffalo, and paid for by a draft on said Worthington, drawn by said Jones & Co. to the order of D. Ferguson, cashier, and which draft was paid at the plaintiff's bank from the proceeds of a note

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of Worthington, discounted at said bank on the 11th of November following, the bank at the same time receiving from said Worthington an indorsement of the bill of lading for said wheat, made at Milwaukee by the shippers thereof, the Western Transportation Company, in the form following, so far as it is necessary to state the same :

“MILWAUKEE, *November 8, 1871.*

“Received of George L. Jones & Co. the following packages (contents unknown), in apparent good order :

|                                                                                                    |   |                                                                                                                       |
|----------------------------------------------------------------------------------------------------|---|-----------------------------------------------------------------------------------------------------------------------|
| Account of D. Ferguson.<br>Cash.<br>Care of S. K. Worthington,<br>Buffalo, N. Y.,<br>Prop. Mohawk. | } | Fifteen thousand (15,000) bushels of wheat.<br>Milwaukee to Buffalo, seven cents per bushel, to be transported, etc.” |
|----------------------------------------------------------------------------------------------------|---|-----------------------------------------------------------------------------------------------------------------------|

The plaintiff had also proved that said wheat had come into the possession of the defendant, and was in its possession at the time of a demand for the delivery thereof before the commencement of the suit, which was refused.

The plaintiff had thus shown title to said wheat in itself, by the transfer and delivery of such bill of lading upon Nov. 11th, to said bank, and as the case then stood it was clearly entitled to recover for said wheat, and the motion for a nonsuit was properly denied.

At the close of the case the defendant's counsel submitted to the circuit judge seventeen propositions or requests to charge, and asked the court to rule and charge, as matter of law, in accordance with such requests or propositions, which the circuit judge refused to do, and the counsel thereupon duly excepted to such decision.

Upon the argument, or in the points of the counsel for the defendant, these propositions or requests are not particularly discussed, or either of them. But the argument and points cover these propositions in a general way, as if the whole case, upon the law and the evidence, was open for our consideration.

The evidence given on the part of the defendant, in connection with the plaintiff's evidence, given before it rested and in reply, clearly establish, I think, that Worthington was the general owner of this wheat; that he had contracted to sell it to one Nims upon Nov. 11th, before its arrival at Buffalo; that on the arrival of the propeller containing said wheat upon Nov. 16th, he took charge of

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the same, as he was authorized to do by the express terms of the bill of lading, "in case the said bill of lading, properly indorsed, was not delivered to the agent of the shipper on or before the arrival of said property at its destination"—(which it appears was not done); that said Worthington caused said wheat, by arrangement with said Nims, to be stored in an elevator at Buffalo, named the Niagara elevator, being an elevator connected with the track of the Erie railroad, and to which its cars had ready access, and where the same was unloaded on the morning of the 17th of November into bins called railroad bins, and credited to Worthington or his order on the books of the elevating company; that afterwards, on the same day, between the hours of twelve and one o'clock, at the instance of Nims, telling him he could not pay for the wheat that day, but could the next day if he would give it to the Erie railway company to his own order, Worthington drew and delivered to said Nims an order in the words following:

"BUFFALO, November 17, 1871.

"*Prop. Mohawk or Niagara Elevator:*

"Deliver to Erie railroad fifteen thousand bushels Mil. wheat, more or less.

"14,943.12.

"15,000 bushels.

S. K. WORTHINGTON."

The evidence, I think, shows that the figures, 15,000, were originally on the bill, but the figures, 14,943.12, were put on it by a clerk of the railroad company on its presentation at one of their offices, when the bill of lading hereafter mentioned was signed. The bill also has upon it the words, "subject to —— order," with an erasure over them in ink.

The above described order, it appears, was taken by Nims to Caldwell, the commercial freight agent of the Erie railroad, at Buffalo—with whom Nims had, three or four days previously, agreed upon the rate of freight for said wheat—who indorsed on said bill, at the foot thereof, the words and figures as follows:

"Nov. 18—Erie 14943, 12.

"For O. L. Nims, agent, 37 cars."

And signed a bill of lading then presented to him by said Nims, and delivered the same to him in the words and figures following—so far as I think necessary to state the same:

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"ERIE RAILWAY COMPANY,  
"BUFFALO, November 17, 1871. }

"Received from O. L. Nims, Agent, in apparent good order:

|                                                                                                                                                       |   |                                                                                                                                                                                                                                       |
|-------------------------------------------------------------------------------------------------------------------------------------------------------|---|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>"Ac. O. L. Nims, Agt.,<br/>Care J. M. Fisk &amp; Co.,<br/>New York.<br/>Subject to order<br/>Farmers' &amp; Mechanics' Nat. Bank,<br/>Buffalo.</p> | } | <p>15,000 bush. 2 Milwaukee wheat,<br/>more or less, freight to New York<br/>15 cents per bushel, free of light-<br/>erage, at owner's risk of strict<br/>weight or measure at point of de-<br/>livery. Owner to load and unload.</p> |
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"To be transported by Erie railway company to their warehouse at New York, ready to be delivered to the party entitled to the same, etc., etc.

(Signed)

"L. D. CALDWELL, C. F. Agent."

This bill of lading, Nims, on the same day (November 17th), took to the Farmers and Mechanics' national bank, and then indorsed and delivered the same to the said bank, with his draft at 30 days upon J. M. Fisk & Co., for \$18,750, which was then discounted by said bank upon the security of the said bill of lading.

It appears, also, that said Worthington had a policy of insurance on said wheat, which was canceled after it was loaded in the cars on the 18th; and that on the same day Worthington and Nims met, and Nims told him he had not made his arrangements so that he could pay him that day, but to send in the bill the next day and it would be paid. The next day was Sunday, and on the following day, Monday, Worthington sent in his bill for payment, which was in the words and figures following:

|           |                                |             |
|-----------|--------------------------------|-------------|
| "1871.    | O. L. Nims & Co.,              |             |
| "Nov. 14. | Bought of L. K. Worthington,   |             |
|           | "To 14,983.12 bu. Mil. Wheat @ |             |
| "140½     | .....                          | \$20,995 19 |
|           | "Cargo Mohawk to arrive.       |             |
|           | "Fire insurance paid."         |             |

Nims, it appears, failed on the 20th or 21st, and in the meantime the wheat loaded on the said cars had been sent forward to New York.

Upon these facts, substantially undisputed, the question is presented whether any error was committed by the circuit judge in his

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charge and refusals to charge as requested, as specified in the exceptions stated in this case.

The third point submitted in the elaborate argument by the counsel for the defendant, is as follows:

"*Third.* The Farmers and Mechanics' National Bank, as the consignee in the shipping bill of the Erie railway company of November 17th, is entitled to its lien for the amount of the draft it discounted at the request, and for the use of, Nims, in whose name the wheat was shipped and receipted."

"1st. The delivery of the shipping bill by the Erie railway company to the bank by Nims, the shipper, upon the delivery, possession and indorsement, of which the bank agreed to, and did discount the said draft, protects it to the extent of its advance in the conceded absence of any notice that Nims was not the actual and *bona fide* owner of the wheat."

The counsel claims that "the bank stands behind and within the first section of the factors' act, independent of the question whether Nims was the true owner of the wheat."

So far as relates to the factors' act, I think the argument and claim of counsel is unsustainable. The first section of the factors' act so called, which is an act (Laws 1830, chap. 179), entitled "An act for the amendment of the law relating to principals and factors and agents," is as follows:

"After this act shall take effect, every person in whose name any merchandise shall be shipped shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandise to a lien thereon: "1st. For any money advanced, or negotiable security given by such consignee, to or for the use of the persons in whose name such shipment shall have been made. 2d. For any money or negotiable security received by the persons in whose name such shipment shall have been made, to or for the use of such consignee."

The provisions of this act do not apply to or include the Farmers and Mechanics' Bank. Such bank was not a factor or consignee of Nims; and Fisk & Co., the consignees, did not accept the drafts. This act only applies in favor of consignees named as such in the bill of lading. It was designed to protect factors and agents and consignees appearing to be such on the face of the bill of lading, and who might be induced, on the faith of such bills, to pay money or incur liabilities for the principal or shipper of goods.

In the case of *Dows v. Greene*, 24 N. Y. 640, and *Dows v. Rush*,

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28 Barb. 186, Dows and Cary, the plaintiffs, were the consignees named in the bill of lading.

In the case of *Bank of Rochester v. Jones*, 4 N. Y. 497, the forwarder's receipt for the flour obtained by the owner was delivered by him to the bank at the time of the discount. This was equivalent to the assignment of the bill of lading by the owner. So in the case of the *City Bank v. R., W. & O. R. R. Co.*, 44 N. Y. 136, the wheat mentioned in the bill of lading was consigned on its face to the order of the owner, and was indorsed by him and delivered to the bank as security for his drafts, with direction to deliver the wheat to one Egart, on whom the drafts were drawn, on his payment of the drafts. The bank in that case was the assignee in effect of the bill of lading, for its security.

The cases all hold that a bill of lading, to a certain extent, is negotiable and binds the property, and that an assignment of it transfers title to the goods whenever the shipper has any title to pass by sale or assignment, and all his title, from *Lickbarrow v. Mason*, 2 T. R. 63, and S. C., 6 East, 21, down to the last-mentioned case in the court of appeals.

The defense of the Farmers and Mechanics' Bank, if sustainable, must rest upon other grounds, and, I think, it can only rest upon the ground that Worthington had, by his own act or fault, clothed Nims with the possession and apparent title to this wheat.

While the plaintiff, by the transfer to it of the bill of lading of this wheat given by the shippers at Milwaukee, acquired a title to it as security for its advance to Worthington, to enable him to pay his acceptance for the price; yet, as was well remarked by the learned circuit judge in his charge to the jury, "when the property came to Buffalo, and by the consent and allowance of the plaintiff it went into the possession of Worthington and was held by him in store subject to his order, he was in a situation where he could deal with a *bona fide* purchaser in such a manner as to deprive the plaintiff of its security. As against these persons, he could, as he did, deal with it as his own. As the general owner of the property, his acts bind the Manufacturers and Traders' Bank precisely, as to such persons, as if it had no title to or lien upon the wheat.

As a general proposition, a man cannot be deprived of his property without his consent, and also it is equally true that no one can transfer to another a better title than he has himself. But these propositions are not unqualifiedly true. In respect to the sale and

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transfer of personal property, a party who has simply delivered possession conditionally upon a contract of sale, or who has been induced by fraud to part with the possession of his goods, will lose the same in case they are sold and delivered by his vendee to a *bona fide* purchaser without notice of the condition or the fraud. Such is the case in *Mowrey v. Walsh*, 8 Cow. 243, and *Root v. French*, 13 Wend. 572; *Evans v. Salters*, 12 Pick. 306; *Saltus v. Everett*, 20 Wend. 272, and in numerous cases. In *Stevens v. Hyde*, 32 Barb. 175, the cases are collected and discussed. In the case of *Rawls v. Deshler*, 3 Keyes, 572, the order was as follows:

"Hatch Elevator:—Deliver A. L. Griffin, Esq., or order, 4,328 47-10 bushels white corn, cargo Potomac, subject to my order until paid for."

The delivery in this case was conditional, and Judge DAVIES says of it: "It may be conceded that the title did not pass until the corn was paid for," yet it was held that an assignment of the bill of lading, procured by Griffin as security for a draft discounted for the consignee, carried and held the property."

In this case it seems to me that the delivery of the order to Nims, for the delivery of the wheat to the Erie railroad, was a virtual delivery of the same to Nims. The order was delivered to Nims. Nims had contracted to purchase the wheat. He had agreed with the Erie Railway Company to transport it to New York, and had engaged or been assigned thirty-seven cars for that purpose. The wheat had been sent to the Niagara elevator, at his request, to facilitate the delivery to said railway. Under the facts, the Erie railroad was in fact, and in legal effect, the agent of Nims, to receive this wheat and transport the same to its destination. No terms or conditions were imposed, in the order or otherwise, upon the railroad or upon Nims, except, doubtless, the implied condition that he was to pay for the wheat before it left Buffalo. But the railway company knew of no such conditions, did not receive the wheat upon any condition or trust, or notice of any trust. Worthington had made no arrangement for or with the company to transport it to New York. It was in no sense loaded or received for him, or upon his procurement, unless Nims was his agent; and if so, he would be bound by his acts as such.

In another view, the delivery of this order to Nims virtually gave him the *indicia* of title to or the right to control the wheat. He



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was the vendee of it, with credit given for the payment till the next day, and with delivery to his carrier in the mean time.

In this respect, it is like the case of *Rawls v. Deshler*, *supra*. The property in that case was delivered "subject to the order" of Deshler "until paid for." This condition was on the face of the order. In this case no condition appeared on the face of the order. The words "subject to ——— order" were, before delivery, erased upon the face of the order—or the blank was not filled—so that, in either view, it was a general unqualified order to deliver to the railroad, in the hands of Nims, and was not taken or received by deception or fraud, but freely delivered by Worthington.

It is like the voluntary delivery of property to a vendee, in expectation of payment within a day or two, as was the case of *Downs v. Green*, 24 N. Y. 638. In that case it was considered, between the parties, a sale for cash, but the wheat was delivered to the owners to enable the vendee to receive the money, as was the case, doubtless, in *Rawls v. Deshler*, and probably in this also.

These facts, I think, bring the case within the rule asserted in *Downs v. Green*, and in the case of *Rawls v. Deshler*, and in the leading case of *Lickbarrow v. Mason*, 2 T. R. 63, that, "whenever one of two innocent parties must suffer by the acts of a third, he who enabled such third person to occasion such loss must sustain it."

Worthington gave Nims the power to get the bill of lading, which gave him the apparent title, and thus enabled him to obtain by its transfer the money of the Farmers and Mechanics' Bank, which is conceded to be a *bona fide* holder of the bill.

The facts in the case are all within a narrow compass, and there is not, that I can see, any essential conflict in the evidence upon any of the material facts. The instruction of the circuit judge to the jury, which was duly excepted to, that "if they believed the arrangement for the delivery of the wheat to the railroad was as stated by Worthington, the plaintiff was entitled to recover," I think erroneous. The instruction is to be considered in view of all of the facts of the case taken in connection with the testimony of Mr. Worthington.

Viewing the testimony of Mr. Worthington in the light of the conceded and undisputed facts of the case, the defense, it seems to me, was established. The question is, not what Mr. Worthington intended, but what he did, which tended or contributed to clothe

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Nims with the possession and apparent right to control this wheat. He did enable him to get the wheat into the hands of the carriers employed by Nims, and under circumstances which led the carrier to suppose, and act upon the supposition, that he was the real owner. This was sufficient to enable Nims to perpetrate the fraud upon him and upon the bank, which, if not contemplated, was in fact consummated through the instrumentality of this bill of lading.

I have not particularly discussed the various exceptions arising upon the requests of the counsel, but it seems to me that they embrace a sufficient number of sound propositions, with the exception to the charge, to make it our duty to grant a new trial upon the principles above stated and discussed.

A new trial should, therefore, be granted with costs to abide the event.

*New trial granted.*

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COOK, plaintiff in error, v. PEOPLE.

*Seduction — indictment — election between charges — chastity of prosecutrix — evidence — hypothetical question — pregnancy.*

In an indictment for seduction under promise of marriage two offenses were charged, one as having taken place July 2, the other August 19. *Held*, that the refusal of the court at trial to compel the prosecution to elect upon which charge it would proceed could not be alleged as matter of error.

The prosecutrix testified to the first offense charged. *Held*, that the admission of her testimony to prove the second charge was error. After the commission of the first offense she was no longer "chaste," and the crime could not be committed as against her.

Evidence on the part of the people that the prisoner, subsequent to the seduction, had refused to marry the prosecutrix, *held*, inadmissible.

On direct examination, the prosecutrix having been questioned as to whether she was induced to have the connection on July 2 by the promise of marriage, was further asked: "And would you have consented to it in the absence of a promise?" *Held*, that the question called for a merely speculative answer on the part of the prosecutrix, and was inadmissible. *Kenyon v. People*, 26 N. Y. 203, explained and limited.

The existence of pregnancy is not essential to a conviction under the statutes in relation to seduction.

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WRIT OF ERROR to the general sessions of the county of Jefferson, to review a conviction for seduction under promise of marriage. The facts appear in the opinion.

*L. H. Brown*, for plaintiff in error.

*P. C. Williams*, district attorney, for the people.

TALCOTT, J. The writ of error in this case brings up the record of a conviction of the plaintiff in error, for seduction under a promise of marriage, under the statute of 1848; with a bill of exceptions attached.

The first exception to which our attention is called is to the refusal of the court to compel the district attorney to elect upon which count of the indictment he would proceed. The indictment contains two counts, each charging an offense under the statute, alleged to have been committed against Mary Lutz: one charging an offense committed on the second of July, and the other on the 19th of August. It appears from the course of the trial that these two separate charges were not inserted in the indictment to meet any apprehended variance as to time, or otherwise, but were, in point of fact, intended to charge two distinct offenses committed at different times. As a general rule, it is not permissible to charge two distinct felonies in the same indictment, as it tends to confound and embarrass the defendant in his defense, and, in general, where an indictment contains charges of two or more felonies, the public prosecutor should be compelled to elect upon which he will proceed to try the prisoner. The modern doctrine, however, is, that the refusal to compel an election in such a case cannot be alleged for error, but is a matter of discretion. *People v. Baker*, 3 Hill, 159. Therefore, whether the offense described in this indictment be a misdemeanor, as it is denominated in the statute creating it, or a felony, no remedy for a refusal to compel an election can be obtained by writ of error.

But we think a clear error was committed in a subsequent ruling growing out of these two charges. After the prosecutrix had testified clearly and fully to the commission of the offense on the second of July, as charged in the first count of the indictment, the date being distinctly fixed and positively testified to, the public prosecutor was permitted, against the objection and

exception of the defendant, to go on to prove the offense charged in the second count of the indictment, and alleged by the prosecutrix to have been committed on the 19th of August, and subsequent to the one which she had first described. This, we think, was clearly wrong without reference to the question whether, notwithstanding no election has been compelled, any more than one distinct, substantive and separate felony can be proved under one indictment. After the prosecutrix had testified to the illicit intercourse on the second day of July, the people themselves had proved that it was impossible that the second count in the indictment could be true. An important requisite to the offense charged is, that the female against whom it is alleged to have been committed, shall have been of a previously chaste character. The requisition of the statute, it is held, relates not to the reputation of the prosecutrix but to her actual condition, and requires absolute personal chastity. *Kenyon v. People*, 26 N. Y. 203. It is, therefore, impossible that the offense be twice committed against the same female. If she has once consented to and willingly permitted sexual intercourse with herself, she no longer possesses that chaste character required by the statute as an essential ingredient of the offense. Accordingly, where a seduction under a promise of marriage had taken place four or five years before the indictment, and the illicit intercourse and the promise of marriage had continued down to within less than two years before indictment found, it was held that the offense could not have been committed within the two years limited by statute before indictment found. *Safford v. People*, 1 Park. Cr. 474. When, therefore, the prosecuting attorney had, as he insists, clearly established the commission of the offense on the second day of July, he undertook that which was legally impossible when he undertook to prove the charge set out in the second count. The evidence does not appear to have been offered merely to prove a continuance of the illicit intercourse; for such purpose it was immaterial, and so far as we can see from the case it was an attempt to sustain the second count of the indictment by proof of an entire new seduction and new promise of marriage, each of which was objected to.

It is further shown, by the bill of exceptions, that an offer was made on the part of the people to prove that, subsequent to the seduction, the prisoner had refused to marry the prosecutrix. This was objected to on the part of the prisoner, held admissible by the

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court, and an exception taken. We cannot imagine any theory upon which, as the offense is described by the statute, this testimony was admissible. Perhaps the statute might have been deemed more reasonable if it had provided that the offender should not be liable to the penalties of the law, provided he was in good faith ready and willing to fulfill the promise upon the faith of which the female had submitted to his embraces, but the legislature has not seen fit to make any such provision. The willingness or unwillingness of the party charged with the offense to perform his promise is wholly immaterial. The statute provides that an actual marriage between the parties should constitute a bar to a conviction. No proof short of actual marriage would have availed the prisoner. And the proof offered against him was wholly immaterial to the offense, and must therefore be inadmissible. The counsel for the people does not undertake to justify this ruling, but insists that the exception is unavailing because the question was not directly answered. The answer which was given by the witness was to the effect that the prisoner had married another person subsequent to the seduction of the prosecutrix. This was a substantial answer to the question. In actions for breach of promise to marry, marriage to another is held equivalent to a refusal to marry the plaintiff. The statement was intended as in answer to the question, was so received and was such for all practical purposes. We can see no legitimate purpose for which the question could have been asked, and persisted in, after objection and exception. The testimony was calculated to prejudice the position of the prisoner, excite sympathy for the prosecutrix, and could have been designed for no other purpose. We think the admission of it was clearly erroneous.

Another question to the prosecutrix was permitted by the court against the objection and exception of the prisoner's counsel. It was as follows: "Were you induced to have the connection on the second of July by the promise of marriage; and would you have consented to it in the absence of a promise?" To which the witness answered that she was so induced, and would not have consented in the absence of a promise. This was objected to by the prisoner's counsel on the ground that it was a question for the jury to determine, and so we think, as to the latter branch of the question, to wit: calling for a statement as to what would have been her conduct under circumstances different from those to which she testified. Hypothetical questions are only permissible in regard to certain

matters involving science or skill. To constitute the offense for which the prisoner was on trial, the seduction must have taken place "under promise of marriage." Whether this means only that the seduction must have taken place while a promise of marriage between the parties existed, or, according to the generally received opinion, that the illicit intercourse must have been procured through the influence of the promise of marriage, the question was equally obnoxious to objection. If it is only necessary that a promise of marriage should have existed, the question was immaterial, and introduced an immaterial issue; but if it be necessary, which we think is the true construction of the statute, that the jury should be satisfied that the consent of the female to the illicit intercourse was induced by means of the influence of the promise of marriage, and in the expectation and belief that the promise would be performed, then the question called for a mere speculation, and substituted the prosecutrix in the place of the jury. When the court held the question to be a proper one to put to the witness, it necessarily held that her answer would be legal evidence on the subject. That it was so considered by the court is further evinced by the charge to the jury, in which their attention is specially called to the fact that the prosecutrix testified "that she never would have done it if it had not been for the promise of marriage."

At most, this testimony could have been nothing more than the belief of the witness, and a witness under every possible inducement to assert a particular belief. Belief without knowledge or recollection is not evidence. 1 Phil. Ev. 290; *Butler v. Benson*, 1 Barb. 526, 557.

Belief of a witness from entries made in his docket that he had issued a summons, is not admissible. *Brown v. Cady*, 19 Wend. 497. "Would you have shot at the tin pipe if you had not understood from the defendant that he would pay the damage?" is inadmissible. *Rich v. Jackway*, 18 Barb. 357. An underwriter cannot be permitted to testify that if he had known certain facts of which he was ignorant he would not have assumed a particular risk. *Jefferson Insurance Co. v. Cotheal*, 7 Wend. 72. "Would you have indorsed this note if you had not had their note and negotiated it?" was held by the court of appeals to be inadmissible, upon the distinct ground that it called for the operations of the mind and not for facts. *Newell v. Doty*, 33 N. Y. 94. "What, under your instructions from Mr. Hawke, or your agreement with him,

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would you have done with the proceeds if you had effected a sale?" was held to be inadmissible. *Cowdrey v. Coit*, 44 N. Y. 382. "Did you give, or intend to give, any thing more than your opinion in regard to its condition?" asked of a witness sued for fraud in the sale of a boiler, was quite recently held by the court of appeals to be inadmissible. *Waugh v. Fielding*, 48 N. Y. 681. Some of the cases referred to, it is true, are not put upon the distinct ground that hypothetical questions are inadmissible. But Mr. Greenleaf, upon the authority of *Berthon v. Loughman*, 2 Starkie, 229, lays down the rule explicitly that a witness cannot be asked what he would have done in a particular case. Greenleaf's Ev., § 441. And McNally (McNally's Ev., ch. 28) says: "A witness, when under examination in chief, must not depose as he thinks or persuades himself to believe. He must swear from his knowledge of the facts."

It is true it has been held, in certain cases, that intentions which have existed in the mind may be inquired directly from the witness, in cases where the existence of a particular intent at a certain time is material. As in the case of making an assignment charged to have been made with intent to defraud creditors. But this is acknowledged to be an innovation upon the general rule, was received with great doubt, and has been adhered to in the particular cases on the principle of *stare decisis*. The judicial inclination is clearly against extending even this principle to new cases. *Cortland Co. v. Herkimer Co.*, 44 N. Y. 22; *Waugh v. Fielding*, 48 id. 681; *Ballard v. Lockwood*, 1 Daly, 158. Certainly it is a most unsafe kind of evidence, as it is not only unsusceptible of contradiction by any human testimony, but the most honest witness may very well be mistaken as to what were the operations of his mind on a former occasion. But it will be observed that these inquiries referred to, and which have been held admissible in certain cases, relate to a supposed past fact; that is, the inquiry is as to what particular intent or design was entertained by the witness on a certain occasion and under existing facts. Here the inquiry is not as to any past or existing act, but as to what would have been the mental operations and desires of the witness under a state of facts contrary to those which she has testified did, in fact, exist.

Judge ALLEN, delivering the opinion of the court of appeals in *Teerpenning v. Corn Ex. Ins. Co.*, 43 N. Y. 279, says: "As a rule witnesses must state facts, and not draw conclusions or give opinions. It is the duty of the jury or court to draw conclusions from the

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evidence and form opinions from the facts proved. The cases in which opinions of witnesses are allowable constitute exceptions to the general rule, and the exceptions are not to be extended or enlarged so as to include new cases except as a necessity to prevent a failure of justice." The principle thus stated seems to be decisive of the question here presented. We apprehend that the statement of the prosecutrix in answer to such a question, would not afford much aid to an intelligent mind in arriving at a satisfactory conclusion on the point, and, as far as it had any influence, it would tend to substitute her in place of the jury, and induce the latter to suppose that the question was foreclosed by her positive testimony.

It was claimed on the argument that such a question was held to be admissible, under an indictment of this character, in *Kenyon v. People*, 26 N. Y. 203. It is proper, therefore, to examine that case with more care as, if we should find the question distinctly passed upon by the court of last resort, it would be our duty to follow that ruling, however opposed we might deem it to the established law and principles of evidence. We think a careful examination of that case furnishes no authority for the proposition, that a witness may be asked what would have been his conduct at a past time under a supposed state of facts which did not exist. That case first makes its appearance in the reports in 5 Park. Cr. 254 in the supreme court of the seventh district. A question put to the prosecutrix was: "What influence did this promise of his to marry you have upon your mind by way of inducing you to consent to have sexual intercourse with him?" She answered: "I thought he was going to have me and nobody would know it." Now it is here to be observed, that although the question was put in such form that the witness might perhaps have been readily impelled to answer it by stating she would not have consented except for the promise, yet the question strictly called for no such answer, and was not so answered. It was analogous to the question as to what intent had existed in the mind of the witness on a former occasion, or rather to the question sometimes put on the trial of indictments for false pretenses as to the effect of the representations on the conduct of the witness, not what would have been his actions under a different state of facts. The answer of the witness was confined to a statement of what she claimed she actually did believe under the state of facts which existed, and she did not attempt to make any statement as to what she would have done under a different state of facts.



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As the case is reported in the supreme court, it does not appear that the counsel for the prisoner made any point upon the admission of this question and answer, and the opinion of the court makes no allusion to it. In the report of the case in the court of appeals, it does not appear that any point was made upon the question, and the opinion of a majority of the court, delivered by Judge WRIGHT, makes no allusion to it. But BALCOM, J., who delivered a partially dissenting opinion, does consider the question, and holds the evidence to be admissible upon grounds and authorities which illustrate the distinction between the question in that case and the one at bar. He says: "Questions as to what influence the representations of the prisoner have had upon the mind of the prosecutor have generally been allowed in cases where their effect was a material point to be determined. *People v. Haynes*, 11 Wend. 557; *People v. Miller*, 2 Park. Cr. 197. And it is now settled that witnesses may, in certain cases, state what their undisclosed intentions were in transactions. An assignor may testify whether he intended to hinder, delay or defraud his creditors in making an assignment. *Seymour v. Wilson*, 14 N. Y. 567; *Pope v. Hart*, 35 Barb. 630. And there is no difference in principle between permitting a witness to testify what his undisclosed intentions were, or whether he had a particular one in doing a specific act, and allowing him to state the undisclosed effect that a certain representation or promise had on his conduct." Thus it appears that Mr. Justice BALCOM held the question and answer in that case admissible, solely upon the ground that it was within the principle of those cases which held it permissible to ask a witness as to the existence of an undisclosed intention, assumed to have existed as a matter of fact at a former period, and as to what effect was in fact produced upon the mind of the witness by certain representations which, while perhaps tending to produce the same effect upon the minds of a jury, is still essentially a different thing from asking the witness to speculate as to what he now believes would have been his conduct on a former occasion if the circumstances had been different. So that, considering the case of *Kenyon v. People* an authority for the question there put, and the answer there given, it is not this case, and although in the light of the more recent decisions, some of which have been referred to, that case may well be considered of doubtful authority on this point, it is not necessary to question it here.

This is not a kind of case which calls for any departure from the established and safe principles of evidence; such cases are sufficiently dangerous to the party accused when he is freely accorded all the protection which the strictest rules of evidence afford. A charge of this description is, in this respect, like that of rape, which is said by Lord HALE, in enjoining caution in its investigation, to be "an accusation easy to be made, hard to be proved and harder to be defended by the party accused, though never so innocent." Lord HALE further says, after referring to several false charges of rape which had occurred within his experience: "I only mention these instances that we may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon, without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony, sometimes, of malicious and false witnesses." 1 Hale's P. C. 635. The experience of most professional men, who have had much part in the administration of criminal justice, will admonish them that care is required lest the statute creating the offense described in the indictment in this case be sometimes used as the facile instrument of extortion or revenge, instead of a shield for innocence and a protection to female virtue. We are of the opinion that an error in law was committed in the ruling upon the question as to whether the witness would have permitted the illicit intercourse without the promise of marriage.

After the prosecutrix had been permitted to make her statement as to the transactions of the 19th of August, in which she had stated that the prisoner spent the night with her at her father's house, the prisoner proposed to prove an *alibi* on that occasion, but the evidence was objected to and excluded, and an exception taken to the ruling. We are wholly unable to perceive any sufficient ground for this ruling. The objection was that the evidence was immaterial, and it is urged at the bar that the evidence concerning the transactions of the 19th of August have been withdrawn from the case on the motion of the prisoner's counsel. The bill of exceptions does not show this to have been so as matter of fact. It appears that the counsel for the prisoner moved to have the evidence stricken out, but the court made no decision on the subject. The district attorney consented that portions of the evidence should

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be withdrawn, but insisted that other portions should be retained, but it does not appear that the prisoner's counsel accepted even this offer of the district attorney. The prisoner, so far as we can see, had a clear right to prove an *alibi* on the 19th of August, if he could do so. It would not only have disproved the allegations of the prosecutrix as to transactions positively averred to have occurred at that time, but have tended to discredit the prosecutrix as to her other statements.

It seems that pregnancy did not result from the alleged intercourse. And the counsel for the prisoner claims that without this, a conviction cannot be had under the statute. The statute under which the indictment is found prescribes no such requisite to the offense. It is true pregnancy is usually proved in the civil action for seduction, but this is because it is necessary for the party plaintiff to show damages sustained by reason of the inability to labor of the party seduced, in the language of the common law, "*per quod consortium amisit.*"

There are other exceptions contained in the case, but all the questions likely to arise on a new trial have, we believe, been considered.

The counsel for the people claims that the testimony affords quite satisfactory evidence that the conviction was just upon the merits, aside from the objectionable rulings. With this we have nothing to do. It is the province of the jury to decide on the facts, and the duty of the court to see that no illegal evidence which could possibly prejudice the prisoner is permitted to be given, against his objection.

We have been discussing these questions not only as applicable to the case of the prisoner, but as applicable to the case of all other persons who may be similarly indicted, and some of whom may be accused, "though never so innocent."

The judgment of the general sessions is reversed and a new trial ordered in that court, to which the record and proceedings are remitted.

*Judgment reversed and new trial granted.*

## WILSON v. VAN PELT, appellant.

*Deed — misdescription of lands — when reconveyance will be directed — Evidence.*

Defendant, by verbal contract, agreed to sell and convey to plaintiff certain lands. A deed was made under defendant's direction containing a description, not of the lands agreed to be sold, but of other lands. This deed was accepted by plaintiff under the belief that it covered the lands agreed for. *Held*, that the plaintiff was entitled to the equitable relief, that a reconveyance containing a correct description be executed by defendant.

Evidence in respect to the comparative value of different parts of the parcels of land in controversy *held* admissible, on the question of defendant's fraud.

APPEAL from a judgment in favor of plaintiff in an action in equity, tried at special term in Cayuga by Mr. Justice DWIGHT. It was brought to compel the specific performance of a contract to convey to plaintiff 183 acres of land in Victory, in said county.

The contract was a verbal one. The defendant owned at the time about 200 acres of land, and was to take from plaintiff his farm at Brutus, in said county, in exchange, and reserve the wood upon 18 acres out of his own lot. Defendant executed and delivered a deed of 183 acres, and it was afterward found, as the plaintiff claimed that the description in the deed to the plaintiff was erroneous, and that he did not get the land purchased; but his deed included a quantity of swamp land of little value not sold, and excepted a large portion of wooded up-land pointed out to him at the time of the sale by the defendant, and paid for by him. The judge who tried the cause found, in substance and effect, that the allegations of the complaint were true, and that defendant did not convey the land pointed out to the plaintiff at the time of the bargain, but conveyed other land, knowing that the plaintiff relied upon his statement that the premises described in and contained in the deed delivered to him were the premises actually pointed out and sold to him by said defendant, and that such statement was not true, and gave judgment directing defendant to receive from plaintiff a reconveyance of said premises, and then immediately to execute and deliver a proper conveyance to plaintiff of the premises pointed out and sold as particularly described in the finding of said judge; and judgment was duly entered accordingly, from which the defendant has appealed to this court.

*H. V. Howland*, for appellant.

*J. T. M. Davis*, for respondent.

E. DARWIN SMITH, J. The findings of the judge upon the facts fully warranted the judgment rendered by him. The case presents a clear cause for equitable relief where a grantor of land is trusted to prepare the deed and untruly describes the premises sold, whether by mistake or fraud. *Botsford v. McLean*, 45 Barb. 478, 488; S. C. affirmed in the Court of Appeals, 1870, cited in 48 N. Y. 343; *Rider v. Powell*, 28 id. 310.

Upon the facts found the case is a clear one for relief, on the ground of deception and fraud.

The findings of the judge upon the facts are not unwarranted by the evidence. The judgment cannot be disturbed on that ground.

None of the exceptions in regard to the admission of testimony were well taken. The evidence in respect to the comparative value of the north and the south parts of the parcel was admissible, on the question of the fraud of the defendant. The suggestion that if it had been worthless it would not be a defense may be true; but it nevertheless presented an element of evidence, relating to the situation of the property which the plaintiff was purchasing and the defendant selling, adapted to influencing their conduct in making the trade and proper for the consideration of the judge on the question of the good faith of the defendant in the transaction.

The judgment should be affirmed with costs.

*Judgment affirmed.*

RAWSON, appellant, v. SPRINGSTEEN.

*Statute of frauds — promise to pay debt of another.*

T. employed defendant to construct a house, agreeing to furnish board for him and his workmen and plaintiff contracted with T. to board them. After they had commenced boarding with plaintiff he informed defendant that he was not disposed to board them any longer on T.'s account. Defendant said "he would see it paid; if T. did not pay it he would." *Held*, a promise to pay the debt of another, within the statute of frauds.

APPEAL from a judgment rendered by the county court of Jefferson county, reversing the judgment of a justice of the peace in favor of plaintiff. The action was brought to recover for the board of the defendant and a workman of his engaged in constructing a house for one Tamblin.

Tamblin was to board the defendant and his hands, and sent them to the plaintiff for board, having previously spoken to the plaintiff on the subject. After defendant's hired man had boarded with him some days, plaintiff informed him and also the defendant, a few days afterward, that he would not board them any longer on account of Tamblin, but should look to him for the board bill. To this the defendant replied, as the plaintiff testified, and said: "Mr. Tamblin had agreed to pay for the board, but if Tamblin did not pay it he would himself." The hired man boarded about a week after that, and the defendant eleven days.

The justice rendered judgment for the plaintiff for the price of the board after this agreement, not including the board of the hired man before that time. The defendant had not himself boarded with the plaintiff before the making of such agreement. The plaintiff, it appears, applied to Tamblin for payment of the board, and took an order from him on one Watt which was not paid. Defendant claimed that plaintiff should sue Tamblin, and promised to pay for the board if the amount was not collected of him. Plaintiff declined to sue Tamblin and commenced this action.

*H. J. Welch*, for appellant, cited, upon the question of liability of defendant under the statute, *Chapin v. Merrill*, 4 Wend. 657; *Leonard v. Vredenburg*, 8 Johns. 29; *Mallory v. Gillett*, 21 N. Y. 417; *Simpson v. Patten*, 4 Johns. 423; *Jackson v. Rayner*, 12 id. 291;

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*Smith v. Ives*, 15 Wend. 182; *Packer v. Wilson*, id. 343; *Watson v. Randal*, 20 id. 201; *Barker v. Bucklin*, 2 Denio, 45; *Skelton v. Brewster*, 8 Johns. 376; *Gold v. Phillips*, 10 id. 412; *Gardiner v. Hopkins*, 5 Wend. 23; *Ellwood v. Monk*, id. 235; *King v. Despard*, id. 277; *Meech v. Smith*, 7 id. 315; *Brown v. Curtiss*, 2 N. Y. 225; *Johnson v. Gilbert*, 4 Hill, 178; *Cardell v. McNiel*, 21 N. Y. 336; *Quintard v. De Wolf*, 34 Barb. 97.

*H. S. Gipson*, for respondent, cited, as to the validity of the promise of defendant under the statute, *Simpson v. Patten*, 4 Johns. 422; *Jackson v. Rayner*, 12 id. 290; *Mallory v. Gillett*, 21 N. Y. 414; Throop on Verb. Agreem. 84, and § 613, etc.; also, § 197, etc., § 216, etc.; 3 R. S. (5th ed.) 221; *Brown v. Weber*, 38 N. Y. 187; *Fuller v. Adams*, 37 Vt. 391; *Kingsley v. Balcome*, 4 Barb. 138; *Maule v. Bucknell*, 50 Penn. St. 39; *Barker v. Bucklin*, 2 Denio, 69; *Allen v. Scarff*, 1 Hilt. 209; *Payne v. Baldwin*, 14 Barb. 571; *Robinson v. Dilman*, 43 N. H. 485; *Sinclair v. Richardson*, 12 Vt. 33; *Hill v. Raymond*, 85 Mass. 540; *Brady v. Sackrider*, 1 Sandf. 514; *Brown v. Bradshaw*, 1 Duer, 199.

E. DARWIN SMITH, J. The defendant was at work for Tamblin, and was to receive his board while engaged upon such work. The board was part of the price he was to receive for such work as much as the pecuniary consideration stipulated for in the contract. Confessedly the hired man of the defendant began to board with plaintiff upon the direction and account of said Tamblin. At the end of the first week, the plaintiff informed him that he could board him no longer on Tamblin's account. The defendant being notified of this fact came the next week to work himself, when the plaintiff testified, "that he told him he was not disposed to board him or his hired man on Tamblin's account, and let it run along as some of his board bills had." Defendant then said, "he would see it paid; if Tamblin did not pay it he would."

This is the plaintiff's own testimony as to the terms of the contract of the defendant. The agreement had a good consideration, and would have been a good contract at common law, but it was obviously one of that class of contracts that must be in writing under the statute of frauds. It was clearly a collateral engagement; the defendant agreed to pay "if Tamblin did not;" the defendant undertook as surety for Tamblin; it was, as between him

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and Tamblin, Tamblin's duty to pay for the board, but if Tamblin did not, he agreed that he would; Tamblin was the primary or principal debtor. The parties clearly so understood it, and there is no evidence which warranted the justice in finding any other contract.

The judgment of reversal was put by the county court upon the case of *Brown v. Weber*, 38 N. Y. 187, which in principle, I think, was quite like this and required such a decision.

The judgment of the county court should, therefore, be affirmed.

*Judgment affirmed.*

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WOODBIDGE V. RICHARDSON, appellant.

*Lessor and lessee — surety upon lease — how far liable.*

By the terms of a lease the lessees were to pay the agreed rent by a note, falling due and to be paid at a specified time. *Held*, that the giving of the note did not discharge a surety for the lessees upon the lease, but that such surety remained liable until the note was paid.

The lessees covenanted to keep the leased property insured. The insurance policy being about to expire, the lessees requested the lessor to obtain a renewal of the insurance, which he did. *Held*, that the surety was not liable for the amount of premium paid by lessor for such renewal.

APPEAL from a judgment entered upon the report of a referee. The action was brought to charge the defendant, as the guarantor of a lease executed by the plaintiff to a firm by the name of Addison & Weeks, by a written instrument, for the term of five years from December 1, 1868, for the annual rent of \$3,900, to be paid as follows: \$1,950, in cash, at the commencement of the term of the lease, and at the same time their note for \$1,950, maturing and to be paid six months after the time of making, and a like note every six months during the continuance of the lease. The lessees covenanted to make needful repairs and surrender the property in good condition. The lessees also agreed to keep the property insured in the amount of \$10,000. The defendant, by a written indorsement on said lease signed by him, agreed to be responsible for the faithful performance of said lease by the lessees.

The plaintiff claimed to recover for one-half year's rent of said premises not paid by the lessees; for an amount paid by plaintiff



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for insurance, and for damages caused by the neglect of the lessees to keep premises in repair.

The action was tried by a referee, who reported in favor of the plaintiff in accordance with the demand and prayer of the complaint, and gave judgment for the sum of \$3,656.85, to which the defendant filed exceptions and took an appeal.

*L. Hoteling and O. M. Hungerford*, for appellant.

*Burrows & Palmer*, for respondent.

E. DARWIN SMITH, J. As this case comes before us upon the judgment record with exceptions to the referee's report, without a case containing the evidence, nothing can be considered but the questions of law presented upon such exceptions.

The first objection raised by the defendant's counsel to the referee's report is, to the finding that the defendant was liable to pay the semi-annual rent of \$1,950 for the second six months of the term, payable in advance and interest thereon. The argument is, that, inasmuch as the lessees gave their promissory note for such rent, the terms of the lease were fulfilled, so far as related to the defendant. This argument is untenable. This note was given in compliance with the express terms of the lease, that the said lessees should give their note for \$1,950—maturing and to be paid in six months from date—for the half year's rent in advance.

It did not discharge the obligation of the lessees or their surety to give their note for the rent. The said note must be *paid* before they or defendant are discharged. The giving of the note was a stipulated manner of payment *sub modo*, but it was the mere note of the debtors, and not payment in fact until actually paid, and the giving of the same was in no sense making any new or different bargain or arrangement by the lessor with the lessees, not contemplated and stipulated for in the lease.

No objection is suggested or can be sustained to the finding that the lessor sustained damage in the sum of \$300 for the neglect of the lessees to keep the demised premises in repair.

The exception to the conclusion of law, that the defendant is responsible to the plaintiff to pay the sum of \$200, with interest for that amount, expended by the plaintiff for the insurance of the premises for one year, stands upon a different ground, and is, I think, well taken.

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The rule of law in respect to the obligations of guarantors and other sureties is, that the contract is to be construed strictly, and cannot be extended beyond the express terms of the agreement. *Robinson v. Frost*, 14 Barb. 536; *Dobbin v. Bradley*, 17 Wend. 422; *Grant v. Smith*, 46 N. Y. 93; *Miller v. Stewart*, 9 Wheat. 680.

The referee finds that the lessees of the mill requested the plaintiff to procure the insurance called for by the lease upon the said premises, to the amount of \$10,000, and that plaintiff thereupon caused the said premises to be insured to that amount for one year, and paid therefor the sum of \$209. This was a new bargain between the lessor and the lessees. The former made the advance for the insurance upon the request of the lessees. It was virtually a loan to them of the sum of \$209, upon their credit.

If the lessees had neglected to procure an insurance on the premises, and the plaintiff had been compelled, in consequence of such neglect, to procure such insurance for his own security, the defendant then would, doubtless, have been liable for the amount paid for that purpose under his guaranty. Probably if the lessor had refused to advance this money for the lessees, they would then have obtained the amount from some other source, and the defendant would have been relieved of this claim or liability. He had a right, at least, to insist that his liability should not be thus enhanced by the voluntary act or arrangement of the lessor with the lessees without his assent.

The referee erred, I think, in including this sum in the judgment, and the same should be modified by deducting therefrom the said sum of \$209, with interest from the time allowed in the referee's report (December 1, 1868), and otherwise affirmed.

*So ordered.*

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HULL, appellant, v. MARVIN *et al.*

*Promissory notes — indorsement — liability as between indorsers.*

Plaintiff agreed to sell to a firm certain property and to accept therefor the note of the firm, indorsed by M. A note payable to the order of plaintiff was made, and the indorsement of M. procured, M. being ignorant of the agreement between plaintiff and the firm. *Held*, that M. was not liable to plaintiff upon the note.

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APPEAL from a judgment in favor of defendant entered upon the report of a referee.

This is an action against the makers with the defendant Marvin, as the indorser of a promissory note, in the words and figures following:

"\$325.

SYRACUSE, N. Y., *February* 13, 1871.

"Fifteen months after date, for value received, we promise to pay David H. Hull or order, at the First National Bank of Syracuse, N. Y., the sum of three hundred and twenty-five dollars (\$325) with interest.

"(Signed)

DOYLE & ASHFIELD.

"Indorsed: D. H. HULL, Syracuse, N. Y.

"GEO. L. MARVIN, Buffalo, N. Y."

The defendant, Marvin, appeared and defended, and the cause being at issue was referred to a referee for trial. The referee tried the cause and reported and found, in substance and effect, that said Marvin was a second indorser on the note, with the rights of such indorser in respect to the plaintiff, and dismissed the complaint as to the said defendant with costs. The other necessary facts appear in the opinion.

*Sanders & Baldwin*, for appellant.

*Geo. L. Marvin*, respondent, in person.

E. DARWIN SMITH, J. Upon the face of the promissory note in suit, the defendant clearly stood in the relation of second indorser to the plaintiff. And the referee, as matter of fact, having expressly negatived the existence of any extrinsic facts that could change that relation and give the plaintiff the right to indorse such note, without recourse, so as to make it negotiable, and charge the defendant as liable thereon as indorser without recourse to him, within the cases of *Moore v. Cross*, 19 N. Y. 227; *Lester v. Paine* 39 Barb. 616, and *Bacon v. Burnham*, 37 N. Y. 614, the complaint was apparently properly dismissed.

The referee finds that the said note was given for a soda fountain, purchased by the makers, Doyle & Ashfield, of the plaintiff, and that the said makers agreed to make said note for the price of said fountain, and procure the same to be indorsed by the said defendant Marvin for the security of plaintiff; that the note was drawn at Syracuse, where plaintiff and the makers resided, and sent to

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Buffalo, where the defendant Marvin resided, to procure his indorsement, and the same was returned to the makers duly indorsed by him, and by them delivered to the plaintiff, who then or thereafter delivered the said soda fountain. And the referee further finds that the defendant Marvin indorsed said note without knowledge of the aforesaid agreement between plaintiff and Doyle & Ashfield, and without agreeing or intending to become liable on said note before the plaintiff, who was the payee named in said note. This express finding of fact is not opposed to the evidence, or is not so against the evidence as to warrant a reversal of the judgment on that ground.

There are several exceptions to the reception and rejection of evidence in the case, but I do not think any or either of them well founded.

The referee was correct in excluding parol proof of the contents of the chattel mortgage given to Marvin by the maker of said note, as stated in the case. And if any error was made in respect to any of such rulings it was cured by the subsequent introduction and reception of said chattel mortgage in evidence.

The several exceptions to the testimony offered and given by the defendant were not well taken. The issue of fact was, whether Marvin indorsed the said note as surety for the makers with knowledge of the use to be made of it, and, as Judge FOLGER states the rule in *Meyer v. Hibsher*, 47 N. Y. 270, "was privy to the whole transaction, and knew that the apparent relations of the parties were not the actual ones."

Upon this question Marvin was entitled to negative his knowledge of such facts, and deny his purpose to become such surety for the makers.

The burden of proof was upon the plaintiff to show that the relation apparent on the face of the paper was not the true and actual relation in fact between the parties. This, I think, the plaintiff failed to do upon his own testimony, independently of the testimony of Marvin in his own behalf.

I do not think any error, in substance, was committed by the referee to the prejudice of the plaintiff, and the judgment should, therefore, be affirmed.

*Judgment affirmed.*

NORMINGTON *et al.* v. COOK, appellant.

*Contract for sale of materials — deficiency in quantity.*

Plaintiffs agreed to deliver to defendant a specified quantity of stone at a stipulated price. The stone was delivered and partly paid for, but when defendant came to use it, it was found deficient in quantity. *Held*, that the charge of the judge at circuit, that plaintiffs were entitled to recover for material actually furnished, was not erroneous as against the defendant.

APPEAL from a judgment rendered upon a verdict at the Monroe circuit in April, 1873. The action was brought to recover for a quantity of stone sold and delivered to the defendant.

The plaintiffs claimed that they had contracted with defendant to cut and deliver to him at Havana stone for a church to be there erected, and that they furnished stone to the amount of \$843, and that there remained unpaid \$305, for which the action was brought.

On the trial, the plaintiffs gave evidence tending to establish the contract, as they claimed it, and the delivery of the stone May 22, 1872. The erection of the church was afterward commenced, and in the progress of the work it was found that there was a deficiency in the amount of stone. The defendant's counsel moved for a nonsuit on that ground, which motion was denied, and the jury found, under the charge of the court, for the plaintiffs the amount claimed by the plaintiffs upon the contract, deducting therefrom the sum of \$90 for the deficiency in the stone, for which amount, \$227.70, judgment was duly entered up.

*W. F. Cogswell*, for appellant.

*J. C. Cochrane*, for respondents.

E. DARWIN SMITH, J. The circuit judge charged that the plaintiffs having furnished the stone, in attempting to execute the contract for furnishing the same, and the stone sent by them having been received by the defendant and accepted by him, and no objection made by him that it did not agree in quantity and kind in every respect with the contract, said defendant could not afterward complain that the contract was not fulfilled, but was bound to pay for

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the material which was actually furnished to him if not paid for and that for any deficiency subsequently ascertained in the stone furnished, they (the jury) must make the proper allowance to the defendant.

The defendant's counsel excepted to so much of the charge as held that the plaintiffs having furnished the stone, in attempting to execute the contract, were entitled to recover for the material furnished as above stated.

The charge was, in substance, so far as the defendant is concerned most favorable to him — perhaps more so than the law required. It carries out the principles asserted in *Reed v. Randall*, 29 N. Y. 360, that in cases of the manufacture or sale and delivery of personal property upon an executory contract, the acceptance and retention of property delivered in pursuance of the contract, is an admission, in legal effect, that the contract is or has been duly performed, with an equitable qualification that, if the property sold is found afterward to be defective or deficient, the vendee must return it or give reasonable notice of the defect, so that it may be repaired or perfected or otherwise remedied.

A vendee cannot under such circumstances retain and use the property without objection, and subsequently refuse to pay for it the contract price. A deduction for any subsequently ascertained deficiency may, and doubtless should, upon equitable principles, be made and allowed to the defendant, as was properly done in this case, and the recovery had for the property actually received and detained and used by the vendee. The charge in this particular was not erroneous as against the defendant, and was in substance and effect equitable and just to him and the verdict right, upon the basis of mutual mistake (*Welch v. Moffat*, 1 N. Y. Sup. 575), and the judgment should be affirmed.

*Judgment affirmed.*

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK v. LEONARD,  
appellant.

*Contract—sale of real estate—release from performance.*

Defendant contracted to purchase certain real estate of S. and to pay a specified part of the purchase price on October 1st, at which time S. was to give a deed. By mutual agreement the time of performance was extended. At the second date agreed upon, defendant started for the place where the contract was to be performed ready to fulfill his part, but was turned back by a message from S. that the deed was not ready, and defendant need not come. *Held*, that defendant was released from all obligation to perform the contract.

APPEAL from a judgment in favor of plaintiff, entered upon the report of a referee. The action was brought to recover the sum of \$100, claimed to be due upon a contract made by the defendant with one Gilbert Scofield for the purchase of a lot of land.

By the articles of agreement, dated August 9, 1871, said Scofield agreed to sell, and the said defendant to purchase, a lot of seventy-five acres of land situate in Oakfield, Genesee county, for the price of \$1,000; of which sum \$100 was to be paid October first, and the remaining \$900 in nine equal annual payments with interest, to be secured by a bond and mortgage of the defendant, which, with the deed, were to be executed and delivered on the said first day of October.

The cause was referred to a referee for trial, and tried by him. He found, in his report, that the parties agreed by parol that the execution of said deed and mortgage, and the payment of the money, should take place in the village of Batavia, and the parties were to meet there for that purpose. He also found that the time for performance of said contract was extended beyond the first day of October by agreement of the parties, to take place within a reasonable time thereafter; that the parties did not meet at all at Batavia, and that on the eighth of December, afterward, Scofield tendered a deed of said premises to defendant and demanded payment of the \$100, which was refused.

By the evidence it appeared that, about the first of October, the time for the fulfillment of the contract was extended two weeks by mutual agreement. Upon the day to which it was extended defendant started for Batavia, ready to perform his part of the agreement,

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but was turned back upon receiving a message that Scofield was not ready to give the deed.

The referee reported that the plaintiff was entitled to recover, and rendered judgment for the \$100 and interest, from which the defendant duly appealed to this court.

*Graves & Pitts*, for appellant.

*Peck & Bowen*, for respondent.

E. DARWIN SMITH, J. The time fixed in the contract for its performance was October 1, 1871. The giving of the deed and the bond and mortgage, and the payment of the \$100, were to be simultaneous acts. Neither party was at Batavia, the place agreed upon for the performance of said contract, on the said first day of October, but the time for such performance was extended two weeks by mutual agreement. At the expiration of the two weeks, and while the defendant was on his way to Batavia with the money to fulfill the contract on his part, he received notice from Scofield not to go to Batavia as he had to go away, and was not ready to give the deed.

The parties did not meet at this time, and no other agreement was made for the extension of the time of performance. I think the referee erred in finding that the agreement to extend the time of performance was an agreement for an extension for a reasonable time. It was an explicit agreement for an extension for a fixed and definite time of two weeks. The failure of the plaintiff Scofield to attend at that time at Batavia, ready to perform the contract on his part, was his own fault and without the assent of the defendant, and as the latter was notified not to attend at the said time and place, and that Scofield was not ready to deliver the deed at such time and place, he was excused from attendance at such place and time, and discharged from all obligation to perform such contract.

The referee clearly erred in finding that the plaintiff was entitled to recover. Upon the clear and undisputed facts of the case. Scofield, the plaintiff's assignor, was not ready to perform on his part, and did not offer at the proper time to perform, and in such case the plaintiff had no right of action against the defendant for his non-performance.

The judgment should be reversed and a new trial ordered, with costs to abide event.

*Judgment reversed and new trial ordered.*



CARPENTER v. O'DOUGHERTY *et al.*, appellants.*Estoppel—mortgagor and assignee of mortgage—Pleading—defect in parties.*

P. executed a bond and a mortgage upon his lands to J. Afterwards J. duly assigned the bond and mortgage to A. P. being indebted to plaintiff, in consideration of an extension of time of payment and a loan of money in addition, procured an assignment from A. to plaintiff of so much of the mortgage as was equal to the debt and loan. Payment of such debt and loan not being made when due, plaintiff was about to foreclose, when P. claimed that the bond given with the mortgage had not been assigned to plaintiff. An arrangement was made for another extension of time, in consideration of which P. procured an assignment from A. to plaintiff of such part of the bond and mortgage as was equal to the amount which the first assignment covered, and of a judgment against P. held by plaintiff. In an action by plaintiff to foreclose the mortgage, *held*, that P. was estopped from claiming that the mortgage was only given to secure a contingent liability which had ceased when the same was assigned to A., and from setting up any defect in the title of A.

A. was made a party defendant in the action. No reason was given for not making her a party plaintiff. *Held*, that the objection thereto could be taken only by demurrer.

APPEAL by a part of the defendants from a judgment in an equity action to foreclose a mortgage, rendered at the special term in Jefferson county. The facts appear in the opinion.\*

*D. O'Brien*, for appellants.

*John C. McCartin*, for respondent.

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\* The following is the opinion delivered at special term, which is referred to in the opinion of TALCOTT, J.:

HARDEN, J. The defendant Patrick O'Dougherty made and executed, in July, 1861, his mortgage to secure \$4,500 to, and delivered it to his father, John O'Dougherty. In December, 1861, an assignment of the mortgage was prepared by the mortgagor, Patrick, in which it is stated that, "in consideration of her kindness and attention to me," the mortgage, was assigned "as a gift to Anna M. O'Dougherty." This assignment described it as "the within mortgage and the bond accompanying it," and it is in the handwriting of the defendant Patrick, and executed by his father, John O'Dougherty. The assignment was on the day of its date, to wit: 25th December, 1861, acknowledged by the father before the son, as justice of the peace, and the certificate of the son as justice of the peace attached to the assignment, and both indorsed on the mortgage.

The mortgage was recorded in August, 1861, and the assignment from the mortgagee to the daughter-in-law, Anna, was recorded 30th April, 1862. On the 8th day of December, 1867, the assignment was made by Anna to the plaintiff of the mortgage alone to secure \$1,000, and acknowledged and put on record the same day.

It is here urged by the learned counsel of the defendant, that the assignment to the

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Carpenter v. O'Dougherty.

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TALCOTT, J. In 1861 the defendant Patrick O'Dougherty, being the owner of certain lands in Jefferson county described in the complaint, executed a mortgage upon the lands, accompanied by a bond, to his father, John O'Dougherty, purporting to secure the payment to said John of the sum of \$4,500, with interest. The mortgage was duly recorded in 1861. In December, 1861, the said John O'Dougherty signed, sealed and acknowledged an instrument purporting to assign said bond and mortgage to the defendant Anna M. O'Dougherty, the wife of Patrick O'Dougherty.

John O'Dougherty died in April, 1862, leaving the defendant his sole heir at law, and in 1865 the said Patrick O'Dougherty was duly

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plaintiff was invalid and inoperative because it did not purport to and did not carry the bond, which is the principal obligation, and the mortgage was but the incident. If we assume that there was a bond made and executed, and delivered with the mortgage, then it follows that the defendant's counsel is correct, if it be conceded that there was no intention to assign the bond. Also, such is the force of the case of *Merritt v. Bartholick*, 36 N. Y. 44. But if there was no bond given and delivered with the mortgage, then the mortgage was the principal and only security, and the only evidence of indebtedness, and an assignment of it would give the assignee a good title to the mortgage, provided the assignment was made by one having legal title to the mortgage.

It is said here, in behalf of the defendants, that there was no delivery of the bond; but it appears that the bond was made out at the time of the mortgage, and that the father told his son to keep the bond, that he did not care for it, and that he did not in fact take it from the possession of his son.

There is some reason to believe that the father made his son the agent to keep the custody of the bond, and that the retention of it by the son was as custodian of his father. Certainly, when Patrick drew the assignment from his father to his wife, he understood it, and, therefore, inserted in the assignment a clause referring to and covering the bond.

The father died on the 26th of April, 1862, and the son Patrick, being the only heir at law, was appointed administrator (April, 1865) of his father's estate. If the assignment by the father to the wife is ineffectual, then the mortgage (and bond, if ever delivered) were assets in the hands of Patrick as administrator. Certainly he took title as administrator, if his wife did not take title to the mortgage through the assignment of the father-in-law.

The defendant, in 1870, entered into an arrangement with the plaintiff for an extension of the time for the payment of a debt he owed the plaintiff, and, to secure a judgment, and as a part of that arrangement agreed to get an assignment of the bond and mortgage from the wife. He obtained such assignment and delivered it to the plaintiff, and received an extension of the time of payment of his debt, and he took up the judgment held by the plaintiff. By the assignment of 1870, of the bond and mortgage, the wife concluded herself as to so much of any title she had in the mortgage (if any) as should be necessary to pay the plaintiff's debt against her husband.

If she had no title to the mortgage or bond, because never delivered to her by John, then, as before stated, the mortgage (and bond, if delivered) were assets in the hands of the administrator, and he could pledge the same as he expressly agreed to do, and did do, in the arrangement he made in 1870 with the plaintiff, and by delivering the assignment made by his wife, and the agreement that plaintiff should hold the same as security upon his lands for \$1,300. The effect of that transaction was to give the plaintiff a good lien upon the real estate as security for his debt of \$1,300.

Parties may create a lien by delivery of title deeds, or by any other act evincing a

## Carpenter v. O'Dougherty.

appointed administrator of the estate of his father, John O'Dougherty. In December, 1867, Patrick being indebted to the plaintiff, in consideration thereof and of a further advance, and of an agreement on the part of the plaintiff to give further time for payment, procured his wife, Anna, to assign \$1,000 of the mortgage, that being the amount due the plaintiff, to be paid to the plaintiff with interest—\$500 in one year and \$500 in two years from the date of the assignment. In this assignment the bond was not mentioned, but the following language was used: "With all the same powers as vested in me by the assignment of the same to me." The money due to the plaintiff was not paid, and he commenced a foreclosure by

clear intention to do so, and the lien will be upheld as between the parties. Equity aids the creditor to carry his lien into effect, and holds the defendant to his agreement. *Rockwell v. Hobby*, 2 Sandf. Ch. 9; *Hammond v. Bush*, 8 Abb. 167; *Robinson v. Williams* 22 N. Y. 386; *James v. Morey*, 2 Cow. 247.

But the defendant's counsel insists that Patrick took title to the mortgage as heir at law, of his father and that as he had the legal title, the mortgage interest merged with the legal estate as he took title if at all as heir at law and through operation of law it may be said that, by his pledging the mortgage as a security for his debt, he evinced a clear intention that his interests as heir-at-law should not thus merge; certainly as long as he held title as administrator, the title to or interest in virtue of the mortgage should not merge. His acts as well as his position as to the mortgage, at the time of the making of the assignment in 1870 with the plaintiff, forbid his insisting on a merger. *Clift v. White*, 12 N. Y. 519.

He elected that the mortgage should be regarded, so far as should be necessary, to secure the plaintiff the \$1,300 debt. That election equity requires him to stand to, and he must be held bound, by his agreements and acts, to have given the plaintiff a good and valid lien upon his lands to the extent required to secure the debt and interest named in the assignment of 1870, and assented to by him in the arrangement then made by him and consummated by delivering over the instrument executed by his wife.

In any view of the defendant's position, as shown by the evidence upon the trial, it is proper to hold him to have given the plaintiff a good lien upon the real estate described in the complaint. He created in favor of the plaintiff an equitable mortgage. *Rockwell v. Hobby*, 2 Sandf. Ch. 9; *Wright, Ex parte*, 19 Ves. 258.

But another principle as against Patrick upholds the title of the plaintiff to the mortgage and its validity as a lien upon the defendant's lands. Patrick stood by, nay, more, he aided his wife in effecting a transfer of the mortgage as security to the plaintiff and to obtain further time from the plaintiff for the payment of the plaintiff's debt, and he thereby estopped himself from impeaching the validity of the security, the plaintiff was thus induced to accept. *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Foster v. Newland*, 21 Wend. 94; *Tilton v. Nelson*, 27 Barb. 595; *L'Amoreaux v. Fischer*, 2 N. Y. 278; *Edgerton v. Thomas*, 9 Id. 40.

The defendant Patrick, in effect, assured the plaintiff in 1870, that the assignment he then delivered to the plaintiff, would authorize, in case of failure to pay, the collection of the \$1,300 debt out of his real estate, and that assurance was believed by the plaintiff and forbearance given, as well as a relinquishment of a judgment, and now the defendant is estopped from defeating the lien he thereby created.

A judgment must be entered in favor of the plaintiff declaring that he has a lien upon the premises described in the complaint for the debt and interest, and that the plaintiff is entitled to costs to be taxed, and as the questions of law have been such that this case is an exception to ordinary foreclosure cases, the plaintiff may have a further allowance of two and one-half per cent upon the amount of the recovery. Code, § 303.

advertisement, whereupon Patrick set up a claim that the plaintiff got no interest for the reason that the bond was not assigned to him, and perhaps claimed that there were other objections to the mortgage. And then a new arrangement was made, on the 16th day of April, 1870, whereby it was agreed between the plaintiff and Patrick that a formal assignment of the bond and mortgage should be executed by Anna to the plaintiff, to secure the payment of the debt then due, with interest, in two years, and the additional sum of \$155.63, being the amount of a judgment then held by the plaintiff and another against Patrick, which judgment was to be assigned to Anna. The arrangement was carried out by the execution and delivery of the assignment by Anna, and the assignment of the judgment to her. Patrick negotiated this arrangement and delivered the assignment to the plaintiff, and received the assignment of the judgment to Anna. And it is the last assignment under which the plaintiff claims in this action, which is to foreclose the mortgage for the collection of the debt due him. There are no other parties who interpose any claim. The defense which Patrick O'Dougherty sets up in his answer is, that the mortgage was made by him to John O'Dougherty, solely to indemnify the latter against liability for the indorsement of certain notes or obligations, and that he paid the said notes and obligations so that said John was never made liable thereon. And that there was nothing due on the mortgage, and it was not in force when assigned by John to Anna. It is manifest that Patrick cannot set up this defense. To permit it would be to allow him to perpetrate a gross fraud on the plaintiff. The counsel of Patrick furthermore claimed, on the argument, that Anna M. O'Dougherty never got any title to the bond and mortgage by reason that they were never delivered to her. It was not necessary that they should be actually delivered. They passed by the assignment, and the court has found that the latter was duly delivered under a state of testimony which warranted the court in holding, as a question of fact, that it was delivered to Patrick for and on behalf of Anna. Besides, Patrick is also estopped from setting up, as against the plaintiff, any defect in Anna's title. He caused the assignment to be recorded, and negotiated the transfer of it to the plaintiff for a valuable consideration, and for his (Patrick's) own benefit. And under the circumstances Patrick cannot allege any infirmity in the title of Anna.

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It only remains, in addition to the opinion delivered at the special term, to notice two points which were apparently made for the first time on the argument of the appeal. It is claimed by the counsel for the appellant that Anna M. O'Dougherty, being part owner of the bond and mortgage, should have been made a co-plaintiff, or that it should have appeared in the complaint that she had refused. Granting this to be so, the defect appeared on the face of the complaint, and the defendants have waived it by not demurring. The interests of Mrs. O'Dougherty are protected by the provision in the judgment, that any surplus over the plaintiff's debt is to be paid over to the county treasurer. With the disposition of that surplus the plaintiff has nothing to do. As between Patrick and Anna, it may be quite possible that he may attack the validity of the mortgage or her title to it. The appellants' counsel also objects that the bond could not be proved on the ground that it was not alleged in the complaint. The facts are that Patrick had always kept the bond in his possession, and the plaintiff was uncertain whether there was in fact a bond or not. It was produced on the trial by Patrick, and the allegations of the complaint were sufficient to enable the plaintiff to avail himself of the bond, if it appeared that one was in existence.

The judgment is right, and must be affirmed with cost of the appeal.

*Judgment affirmed.*

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PEOPLE *ex rel.* WICKS, overseer, etc., v. OSWEGO COUNTY COURT OF SESSIONS.

*Certiorari—a special proceeding—Abatement—Construction of statute—Overseer of the poor.*

An overseer of the poor of a town, as relator, obtained a common-law writ of certiorari to review proceedings in a bastardy case instituted by him. After the writ was served and return thereto made, his term of office expired. *Held*, that the certiorari was a special proceeding and not an "action" or "suit" under the provisions of 2 R. S. 474, § 100 (relating to suits by or against certain officers), and his successor in office could not be substituted as relator.

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People ex rel. Wicks v. Oswego County Court of Sessions.

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APPEAL from an order of the Oneida special term, April 8, 1873, denying a motion made by Jacob Fulmer, overseer of the poor of the town of Amboy, to be substituted as relator in a proceeding of certiorari, commenced by his predecessor in office. The facts appear in the finding and opinion of the special term, which is adopted by the general term.

*A. Z. McCarty*, for appellant.

*L. J. Dorwin*, for relator.

[The following is the finding of facts and the opinion at the special term]:

The relator, George Weeks, then overseer of the poor of the town of Amboy, sued out of this court a common-law certiorari, addressed to the respondents, to review the proceedings and determinations of the respondents in a bastardy case instituted by him.

After the writ was served, and the respondents' return was made and filed, the term of office of the relator expired, and Jacob Fulmer was elected overseer in his place and was duly qualified as such officer, and he now moves this court that he be substituted in place of the late overseer as relator.

DOOLITTLE, J. This proceeding was prosecuted by the relator as overseer of the poor of the town of Amboy, for the benefit of the town. When he ceased to be a public officer, and to represent the town, it would seem to be proper, if not necessary, that his successor should be substituted in his place, to enable him to represent the town in those matters which devolve upon the overseer, and to proceed with the business which the relator commenced and could only commence by virtue of his office as such overseer.

But his right to be substituted will depend upon the provisions of the statute. If that authorizes his substitution, the motion should be granted; if it does not, it must be denied.

The Revised Statutes provide (2 R. S. 474, § 100): "No suit commenced by or against any officer named in this article" which includes overseers, etc., "shall be abated or discontinued by the death of such officers, their removal from, or resignation of their offices, or the expiration of their term of office; but the court in which any such action shall be pending shall substitute the names of the

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successors in such office, upon the application of such successors, or of the adverse party."

The question is, whether the word "suit" or "action," in the section set out above, includes a certiorari.

It has been decided at special term (*Overseers, etc., of Clayton v. Beedle*, 1 Barb. 10), that the words do not embrace writs of error; that a writ of error could not be brought in any personal action, by any one but the defendant in the action against whom the judgment was rendered, and there is no privity between the officer bringing the action and his successor in office. Therefore, no one can be substituted to prosecute the writ. This case is cited approvingly on the first proposition stated. 16 Barb. 593, 594.

A certiorari is no more an action than a writ of error. It is classified as a special proceeding. Crary treats of it in his work as such. In *People v. Stilwell*, 19 N. Y. 532, Justice COMSTOCK says: "The writ of certiorari I suppose to be a special proceeding, according to the classification of remedies contained in the Code of Procedure, § 2."

It is not an action, as that term has heretofore been defined, but I am inclined to think that the proceeding of certiorari might be held to be embraced in the words "suit" and "action," as used in the section of the statute in question, without doing violence to the intention of the legislature, and should so hold, were it not for the case of *Overseers, etc., of Clayton v. Beedle, supra*. That case has been cited approvingly and does not appear to have been questioned, although made more than twenty-five years ago. I think it is my duty to follow it, leaving the point to be reviewed by the general term. A decision of the appellate court on the question seems to be desirable.

The motion is denied.

E. DARWIN SMITH, J. We concur in the foregoing opinion, on the ground that the writ of certiorari is a special proceeding and not an action. It was held to be a special proceeding, for the purpose of costs, under section 318 of the Code, in *Haviland v. White*, 7 How. 157; *People v. Flake*, 14 id. 530, and *People v. Commissioners of Highways*, 27 id. 158.

The order of the special term should be affirmed, with costs.

*Order affirmed.*

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but was turned back upon receiving a message that Scofield was not ready to give the deed.

The referee reported that the plaintiff was entitled to recover, and rendered judgment for the \$100 and interest, from which the defendant duly appealed to this court.

*Graves & Pitts*, for appellant.

*Peck & Bowen*, for respondent.

E. DARWIN SMITH, J. The time fixed in the contract for its performance was October 1, 1871. The giving of the deed and the bond and mortgage, and the payment of the \$100, were to be simultaneous acts. Neither party was at Batavia, the place agreed upon for the performance of said contract, on the said first day of October, but the time for such performance was extended two weeks by mutual agreement. At the expiration of the two weeks, and while the defendant was on his way to Batavia with the money to fulfill the contract on his part, he received notice from Scofield not to go to Batavia as he had to go away, and was not ready to give the deed.

The parties did not meet at this time, and no other agreement was made for the extension of the time of performance. I think the referee erred in finding that the agreement to extend the time of performance was an agreement for an extension for a reasonable time. It was an explicit agreement for an extension for a fixed and definite time of two weeks. The failure of the plaintiff Scofield to attend at that time at Batavia, ready to perform the contract on his part, was his own fault and without the assent of the defendant, and as the latter was notified not to attend at the said time and place, and that Scofield was not ready to deliver the deed at such time and place, he was excused from attendance at such place and time, and discharged from all obligation to perform such contract.

The referee clearly erred in finding that the plaintiff was entitled to recover. Upon the clear and undisputed facts of the case. Scofield, the plaintiff's assignor, was not ready to perform on his part, and did not offer at the proper time to perform, and in such case the plaintiff had no right of action against the defendant for his non-performance.

The judgment should be reversed and a new trial ordered, with costs to abide event.

*Judgment reversed and new trial ordered.*



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Carpenter v. O'Dougherty.

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CARPENTER v. O'DOUGHERTY *et al.*, appellants.*Estoppel—mortgagor and assignee of mortgage—Pleading—defect in parties.*

P. executed a bond and a mortgage upon his lands to J. Afterwards J. duly assigned the bond and mortgage to A. P. being indebted to plaintiff, in consideration of an extension of time of payment and a loan of money in addition, procured an assignment from A. to plaintiff of so much of the mortgage as was equal to the debt and loan. Payment of such debt and loan not being made when due, plaintiff was about to foreclose, when P. claimed that the bond given with the mortgage had not been assigned to plaintiff. An arrangement was made for another extension of time, in consideration of which P. procured an assignment from A. to plaintiff of such part of the bond and mortgage as was equal to the amount which the first assignment covered, and of a judgment against P. held by plaintiff. In an action by plaintiff to foreclose the mortgage, *held*, that P. was estopped from claiming that the mortgage was only given to secure a contingent liability which had ceased when the same was assigned to A., and from setting up any defect in the title of A.

A. was made a party defendant in the action. No reason was given for not making her a party plaintiff. *Held*, that the objection thereto could be taken only by demurrer.

APPEAL by a part of the defendants from a judgment in an equity action to foreclose a mortgage, rendered at the special term in Jefferson county. The facts appear in the opinion.\*

*D. O'Brien*, for appellants.

*John C. McCartin*, for respondent.

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\* The following is the opinion delivered at special term, which is referred to in the opinion of TALCOTT, J.:

HARDIN, J. The defendant Patrick O'Dougherty made and executed, in July, 1861, his mortgage to secure \$4,500 to, and delivered it to his father, John O'Dougherty. In December, 1861, an assignment of the mortgage was prepared by the mortgagor, Patrick, in which it is stated that, "in consideration of her kindness and attention to me," the mortgage, was assigned "as a gift to Anna M. O'Dougherty." This assignment described it as "the within mortgage and the bond accompanying it," and it is in the handwriting of the defendant Patrick, and executed by his father, John O'Dougherty. The assignment was on the day of its date, to wit: 25th December, 1861, acknowledged by the father before the son, as justice of the peace, and the certificate of the son as justice of the peace attached to the assignment, and both indorsed on the mortgage.

The mortgage was recorded in August, 1861, and the assignment from the mortgagee to the daughter-in-law, Anna, was recorded 30th April, 1862. On the 3rd day of December, 1867, the assignment was made by Anna to the plaintiff of the mortgage alone to secure \$1,000, and acknowledged and put on record the same day.

It is here urged by the learned counsel of the defendant, that the assignment to the

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can hardly be doubted, I think, that when such a pond is made the boundary of a grant, that the grantee would go to low-water mark and be entitled to the alluvium made in the manner described in the charge of the judge at the circuit, on the margin of the pond.

Such a grant it would be presumed, I think, was intended to take the grantee to the water's edge at all times, having regard and reference to the beneficial use of the water, and would include necessarily the accretions made within such limits. While, with a pond long used and lawfully kept up, the owner would undoubtedly have the right to flow to the original high-water mark, and have an easement in the land to that extent. *Waterman v. Johnson*, 13 Pick. 265.

The portion of the charge excepted to, we think, was right, and the judgment should be affirmed.

*Judgment affirmed.*

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PEOPLE *ex rel.* ST. THOMAS ORPHAN ASYLUM, appellants, v. GLOWACKI *et al.*, trustees, etc.

*School law — orphan asylums — share of in school fund — Laws 1850, ch. 261 — Mandamus.*

The act of 1850 (chap. 261), relating to distribution of school moneys to orphan asylums, applies to asylums incorporated since its passage, and asylums are entitled to share in money raised by tax in school districts as well as in that raised by the State.

In an application on behalf of an orphan asylum for a *mandamus*, to compel the trustees of a school district to pay to such asylum its share of the school money raised in such district, it appeared that no money had been raised by the district for the asylum, and that all the money in the hands of the trustees had been appropriated to specific purposes, and it did not appear that the asylum school had been taught by a duly authorized teacher. *Held*, that a *mandamus* ought not to issue.

APPEAL from an order denying an application for a *mandamus*. The necessary facts appear in the opinion.

W. J. Sheridan and Thos. C. Montgomery, for appellant.

N. A. Woodward, for respondent.

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MULLIN, P. J. The relator, an incorporated orphan asylum located in the village of Batavia, in the county of Genessee, moved at special term for a writ of mandamus, requiring the defendants, the trustees of a union school district in said village, to pay over to said asylum its share of the moneys applicable to the support of common schools in said district.

The affidavit served, for the purpose of the motion, set forth the number of children taught in said asylum in the years 1869, 1870, 1871 and 1872, and the average attendance in those years; the moneys received from the State by the trustees of said school district, and the amount raised by tax on the taxable property in said district; that the share of the asylum of such moneys has been demanded of the trustees of the district and refused. The asylum does not claim any share of the moneys appropriated to said district from the income of the common school fund. The moving affidavit also alleges that the asylum has been open to the inspection of the trustees of the district, and its managers have been willing to conduct the same in accordance with the rules and regulations of the common schools in said district, of which the trustees had notice.

An affidavit of the trustees of said school district was read in opposition to the motion, in which it is alleged that the amount of moneys raised by said district, for school purposes, is regulated by the trustees, who, pursuant to law, furnish to the inhabitants, at their meetings, an estimate of the sums required for the various purposes connected with the support of the said district school; that it is a misdemeanor to divert the moneys thus raised to any other purpose than that for which they are raised, and that no moneys have at any time been raised in said district for the said asylum, and the balance on hand in 1872 was appropriated to specific purposes, and cannot be appropriated to said asylum without subjecting the trustees to indictment and punishment for a misdemeanor. They further allege that the school kept in said asylum has not at any time been taught by a duly authorized teacher, and it is a misdemeanor to pay any part of the school moneys to the support of teachers not duly authorized to teach. They further allege that no report has ever been made by the asylum to them.

The affidavit of the school commissioner of the district in which said asylum is located alleges that the school kept in said asylum has not been taught by a teacher duly authorized to teach a school; that the asylum has never made any report to him, as school district

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trustees are required by law to do, nor has he been informed that he was at liberty or desired to visit said school, or that it was subject to the rules and regulations of the common schools.

The special term denied the motion on the ground, it is said, that the duty imposed by the act of 1850, chapter 261 of the laws of that year, was laid upon the school commissioners for school commissioners' districts, and not upon the trustees of school districts.

The law referred to is in these words, viz.: "The schools of the several incorporated orphan asylum societies within this State, other than those in the city of New York, shall participate in the distribution of the school moneys in the same manner and to the same extent, in proportion to the number of children educated therein, as the common schools in their respective cities or districts."

The relator appeals from the order denying the motion.

I am very sure the counsel for the relator must have mistaken the learned judge as to the ground on which he denied the motion. The construction said to be given by him to the section substantially nullifies it. The commissioners have to do only with moneys appropriated to the support of schools by the State, and as the orphan asylums cannot share in any part of this income of the common-school fund, they could share only in the money raised by the tax imposed by the State for the support of schools. The amount to which the relator would be thus entitled would be so small as to be scarcely worth the trouble of collecting. If it cannot share, as it cannot under the construction suggested, in the money raised by tax in the district, the act referred to, under which a share is claimed is of no practical benefit to these institutions.

I entertain no doubt but that the act of 1850 was intended to and does apply to all asylums incorporated since as well as before the passage of that act. Nor do I doubt but that they are entitled to share in the moneys raised by tax in the district as well as in that raised by tax by the State. *St. Patrick's Orphan Asylum v. Board of Education of Rochester*, 34 How. 227; *People ex rel. Brooklyn Orphan Asylum v. Board of Education of Brooklyn*, see manuscript opinion of DENIO, J., in the court of appeals.

The mandamus was properly denied, upon the ground that it is not shown that the school kept in the asylum of the relator was taught, during any part of the time for which a share of the money is claimed, by a teacher legally qualified to teach.

The second section of the act of 1850 provides that "The schools

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of said societies" (the orphan asylum) "shall be subject to the rules and regulations of the common schools in such cities or districts, but shall remain under the immediate management and direction of the said societies as heretofore." The act is silent as to the authority by which the rules and regulations by which the asylums are bound, are to be made or adopted. It is, however, certain that the provisions of the school law must be complied with so far as they are applicable.

Section 29 of the school act now in force declares, that "No district, or part of a district, shall be entitled" to any share of the moneys apportioned by the school commissioners, "unless the report of the trustees for the preceding" year shall show that a common school was supported "in the district, and taught by a qualified teacher, for such a term of time as would \* \* \* "entitle it to a distributive share." This section speaks of "*districts*," but it is a regulation that applies to all the districts of the State, and the asylums are, by the act of 1850, bound to conform to it.

Section 42 of the school law expressly forbids the application of any moneys apportioned to a district to the payment of the wages of an unqualified teacher. And, by the next section, it is made a misdemeanor for any trustee to apply, or direct, or consent to the applications of any such moneys to the payment of the wages of such teachers. These sections apply to moneys apportioned to a district, and not in terms to the moneys raised by tax in the district.

I cannot doubt but that the intention was to prohibit the payment of any money raised for school purposes to the payment of the wages of unqualified teachers. I entertain very serious doubts whether these asylums can receive any share of the school moneys, under existing laws, without the greatest injustice to the tax payers in the districts in which they are located.

The moneys raised by the State for common schools are distributed among the several districts in proportion to the number of scholars attending such school between the ages of 5 and 21 years. The number is ascertained from the report of the trustees of the districts, and unless all who are to be counted in ascertaining the portion to which a district is entitled are reported, the district is deprived of its just share to the extent of the omission. By section 61 of the school law, trustees are expressly forbidden to include in the number of children living in their district, between the ages of 5 and

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21, any children who are supported in an orphan asylum or county poor house. It would be very oppressive to compel the appropriation for children for whom they receive nothing and are forbidden even to state the number of to the school commissioners.

DENIO, J., in his opinion, referred to *supra*, says the act contains no provision requiring the officers of the asylum to make returns, and they were not legally in fault for not making them, and suggests that they must ascertain as they best may the number of orphans in the asylum and other facts necessary to enable them to apportion the money, and because they do not, the relator should not lose the money to which it was entitled.

I apprehend the attention of the learned judge was not called to the prohibition just referred to against including children in orphan asylums in the number of children in their districts between 5 and 21 years of age. Had it been, I am quite sure he would not have sanctioned the injustice, as his opinion manifestly does.

It would seem to me that if the court must legislate to give effect to the act of 1850, it should require a report from the officers of the asylum containing the same matters required of the trustees of districts, and the commissioners and State superintendent might include in the apportionment the children that the trustees are forbidden to include in their report. In this way, and in this way only, can the injustice that would otherwise be done to the tax payers of a district be prevented.

A mandamus ought not to issue to compel the trustees of the district to pay their proportion to which the asylum may be entitled. They show they have not got it and are forbidden to pay it out, if they have it in hand, as it was raised for another and different purpose.

If they could now levy a tax on the districts to pay the money there might be no injustice in compelling them to do so. But they cannot raise a tax by their own authority, until a meeting of the inhabitants has been called and refused to vote the amount estimated to be necessary by the trustees.

It is very desirable that the defects in the law of 1850 should be remedied by legislation, and thus protect all parties from the injustice that must result from the attempt to enforce the law as it now is. The order appealed from is affirmed.

*Order affirmed.*

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Strong v. Lee.

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STRONG, appellant, v. LEE, administrator, etc., *et al.*

*Parties, joinder of—action in nature of scire facias.*

In an action, brought as a substitute for a *scire facias*, to revive a judgment against a deceased debtor, *held*, that the heir at law of the judgment debtor and the administrator of his estate could not be joined as defendants.

APPEAL from an order of the special term sustaining a demurrer. The facts appear in the opinion.

*J. C. Strong*, for appellant.

*O. O. Cuttle*, for respondent.

MULLIN, P. J. It is alleged in the complaint in this action, that in April, 1861, Abijah Mann, Jr., recovered a judgment in this court for \$1,065.54 against John McClosky, who subsequently died. At sometime prior to the commencement of the action, Mann died, leaving a last will appointing three persons executors thereof, who assigned said judgment to this plaintiff. The defendant, Lee, was appointed administrator of the estate of McClosky, and the defendant, Victorine McClosky, is one of the heirs at law of said McClosky, and has inherited from him certain land in the county of Genesee, of which said McClosky died seized.

It is further alleged, that no execution has been issued on said judgment, and it remains wholly unsatisfied. Judgment is demanded that the said judgment be revived in plaintiff's favor as against the heirs and personal representatives of said McClosky, and as against his estate, and that plaintiff have leave to issue execution to enforce payment of said judgment.

Each of the defendants demur to the complaint on six grounds:

1. That there is a defect of parties defendant.
2. A defect of parties plaintiff.
3. Several causes of action improperly united.
4. The complaint does not state facts sufficient to constitute a cause of action.
5. It does not state facts sufficient to constitute a cause of action against either of said defendants.
6. The defendant Lee, as administrator, is improperly joined with the defendant Victorine.

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The court at special term sustained the demurrer, on the ground that the administrator and the heir at law cannot be joined in the action, with leave to plaintiff to amend, and judgment was ordered accordingly and from it the plaintiff appeals.

The plaintiff concedes that if the action to revive a judgment, given by the Code is to be governed by the same rules that applied to the proceeding by *scire facias*, as regulated by the Revised Statutes, it cannot be maintained and the demurrer was properly allowed.

But his view of the practice is, that the proceeding by *scire facias* being abolished by the Code, and a remedy by action substituted therefor, the action thus authorized must be governed by the provisions of the Code which apply to other actions brought pursuant to its provisions, and that there must be the same parties plaintiff and defendant, and the different causes of action may be joined as in other actions prosecuted under the Code. If the counsel is right in this, the order of the special term must be reversed, otherwise it must be affirmed.

Section 428 of the Code abolished the writ of *scire facias*, and provides that the remedy theretofore obtainable in that form may be obtained by civil action under its provisions.

By the former practice, if an execution was not issued within two years from the docketing of a judgment, a *scire facias* was necessary in order to obtain an execution on such judgment. A *scire facias* was also necessary when the plaintiff died after final judgment, and before execution issued. So also when a defendant died after final judgment and before execution.

When the *scire facias* was issued by reason of the death of the plaintiff, his executor or administrator was the proper party plaintiff, unless the action was a real one, in which case the heir was the proper party. When the defendant died the writ must issue against his personal representatives. When the judgment was revived and an execution issued against the personal estate in the hands of his executors or administrators, if it was returned *nulla bona*, and the defendant owned real estate liable to pay such judgment, a *scire facias* could issue against the heirs and terre tenants to subject it to the payment of said judgment. Writs against personal representatives were required to issue within one year after the cause for issuing the same shall arise. 2 R. S. (2d ed.) 477, 478, §§ 1, 2, 3.

These provisions are modified by the Code, and as modified apply to judgments docketed since the Code took effect, and a *scire facias*



to revive a judgment is no longer necessary in cases in which the Code has furnished another adequate remedy.

By section 283, an execution may be issued by the personal representatives of a deceased plaintiff on a judgment, to enforce it, within five years after the entry of the judgment. After the expiration of five years from the entry of the judgment, an execution can only issue by leave of the court upon motion, with personal notice to the adverse party, unless he be absent or non-resident or cannot be found to make such service, in which cases it may be made by publication. Code, § 284.

In case of the death of a judgment debtor after judgment, the heirs, devisees or legatees of the judgment debtor, or the tenants of real property owned by him and affected by the judgment, may, after the expiration of three years from the time of granting letters testamentary or of administration upon the estate of the testator or intestate, be summoned to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands respectively, and the personal representatives of deceased judgment debtors may be summoned at any time within one year after their appointment. Code, § 376. The mode of proceeding upon said summons is regulated by the five succeeding sections. Under these provisions, it is no longer necessary to resort to an action as a substitute for a *scire facias* in case of the death of either a plaintiff or defendant, after judgment and before execution; nor to reach the property of the judgment debtor in the hands of devisees, legatees, heirs or terre tenants, the Code furnishing ample redress in those cases.

It does not necessarily follow, that because a new remedy is given to revive and enforce judgments, that the remedy by action, as a substitute for *scire facias*, is abolished. The two may stand together; but if the plaintiff will not adopt the simple and inexpensive remedy provided by the Code, he must be held to a strict conformity to the proceedings required to be pursued in case of *scire facias*, as far forth, at least, as they can be pursued in an action under the Code.

The heirs or terre tenants could not be joined with the personal representatives of a deceased judgment debtor, in proceedings to revive a judgment and enforce it against the personal estate. The two classes of persons had no common interest or liability, hence they must be proceeded against separately. In the proceedings pre-

scribed by section 376 both classes of persons, it would seem, may be united, and a judgment entered determining the liability of each. But no such joinder can take place in an action brought as a substitute for a *scire facias*.

The last clause but one of section 167 of the Code presents, it seems to me, an insuperable objection to uniting a cause of action to revive and enforce a judgment against real property with one against personal. That clause declares that the causes of action that may be united must affect all the parties to the action. By this is meant, I suppose, that each cause of action must affect all those made defendants. A cause of action against the personal representatives cannot bind the heirs or tenants of the real estate. Other difficulties equally fatal to the joinder might be suggested, but this one is enough.

It is true, as the counsel for the plaintiff suggests, that the provisions of the Code, as to parties, forms of pleadings and proceedings, apply to actions brought as substitutes for writs of *scire facias*; but so long as the provisions of the Revised Statutes, in relation to such writs and proceedings under them, are left in force, they must control the joinder of parties and the allegations to be embodied in the pleadings, and under the Revised Statutes no such joinder of parties or causes of action as is attempted in this case can be permitted.

It may be it would lessen expense and trouble to permit such a joinder of parties and causes of action, but the courts cannot sanction it until the legislature shall so require. And as it has provided a cheap and simple mode of proceeding against personal representatives and heirs, etc., it is to be assumed that the Legislature did not understand that the same end could be attained under the then existing practice.

If the plaintiff's counsel had wished to avoid the technicalities attending the prosecution of an action, he should have followed section 376 of the Code.

The judgment must be affirmed, with leave to plaintiff to amend his complaint on payment of the costs of the demurrer and of this appeal.

*Judgment accordingly.*

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Dahash v. Flanders.

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## DAHASH v. FLANDERS, appellant.

*Appeal from County Court—failure to move for new trial.*

Defendant appealed from a judgment entered in the county court upon the verdict of a jury, without moving for a new trial in that court. *Held*, irregular and the appeal dismissed.

APPEAL from a judgment of the county court of Niagara in an action originating in a justice's court. The only question passed upon is one of practice in taking the appeal.

*J. L. & J. H. Buck*, for appellant.

*S. B. Piper*, for respondent.

E. DARWIN SMITH, J. This is an appeal from a judgment of the county court of Niagara county. The case arose in a justice's court, was appealed to and retried in the county court and judgment perfected upon the verdict, from which the defendant appealed to this court upon a case, not having made any motion thereon for a new trial in the county court. In *Bliss v. Swab*, 48 Barb. 342, I expressed the opinion that this court should only review the decisions of county judges on the trial of causes after a motion for a new trial was made in that court, and should be confined to the reviews of the deliberate decision of that court after argument. In this view I understand my brethren in this department have concurred, but the decision has not, that I am aware of, been reported. It was followed in *Hacher v. Ferrell*, decided at the April term, and has been followed also in several cases during the year, and the appeals dismissed. In this case the appeal must therefore be dismissed.

*Appeal dismissed.*

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Gurney v. Atlantic and Great Western Railway Co.

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GURNEY *et al.* v. ATLANTIC AND GREAT WESTERN RAILWAY COMPANY.

*Sale—deficiency in quantity and quality of articles sold—duty of vendee—  
“Employee”—when legal counsel is not.*

A railway company, ordered from a firm of irondealers a certain number of railway “frogs” of a specified quality. The firm sent a less number than that ordered, which was received without objection by the company. Upon using the frogs it was discovered that a portion of them were not of the quality ordered, but the company did not notify the firm of the defect, or offer to return the frogs, but kept the whole and used them. *Held*, that the company could not claim a deduction for the defective quality of the frogs, but were liable for the price agreed to be paid.

It was the duty of the vendee, when it discovered that one or more of the frogs delivered under the contract were not in compliance therewith, if it wished to reject any of the articles delivered, to notify the vendors of the alleged defect, and return or offer to return all the frogs embraced in the contract.

An order provided for the payment, out of moneys in the hands of the receiver of a railway company, of debts owing to “the laborers and *employees*” of the company “for labor and services actually done in connection with that company’s railways.” *Held*, that the order designed to limit the operation of the word “employee” to such servants of the company as were usually engaged in the construction, operation and maintenance of the company’s railways, and did not include one employed as occasional legal counsel of the company.

THESE are appeals from an order directing and refusing payments from a fund in the hands of General Robert B. Potter, receiver, for distribution among the creditors of the Atlantic and Great Western Railway Company. In 1867 actions were brought by Samuel Gurney and others (representing, or in concert with, the great body of creditors of the company) against the Atlantic and Great Western Railway Company, consolidated, which owned railways extending from Salamanca, in this State, through Pennsylvania and Ohio. In that action, and in like actions brought in Ohio and Pennsylvania, General Robert B. Potter was appointed receiver, and entered into possession April 1st, 1867.

The order made by this court provided, among other things, that the receiver, after deducting the expenses of operating the railways, including the purchase of necessary materials and supplies, necessary renewals and repairs, the rent of a railway leased by the Atlantic

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and Great Western, and his own compensation and that of his agents and advisers, should, "out of the balance of earnings in his hands, being net earnings, pay and discharge:

"*First.* Any arrearages that may be due and owing for taxes and public assessments on any of said mortgaged property, or owing to the *laborers* and *employees* of the said consolidated corporation, defendants, for labor and services actually done in connection with that company's railways, or to connecting roads on freight or passenger accounts in the ordinary course of business.

"*Second.* Such sums as may remain actually due for materials and supplies furnished said consolidated company, defendants, for the use of its railways," etc.

Similar provisions were contained in the orders made by the courts in Ohio and Pennsylvania.

The receiver continued in possession of the road, making large disbursements of money from time to time, until the fall of 1868, when the company effected an arrangement with its creditors, and thereupon applied, with their consent, for a release of the line. This was ordered upon payment of the receiver's expenditures and liabilities.

Owing to the impossibility of then ascertaining his liabilities exactly, an estimate was made, and it was found that \$1,218,750 would be required to pay all the receiver's liabilities over and above all his receipts to the close of December 12, 1868, and he was accordingly ordered, upon payment of that sum by this company, to give up the line and mortgaged property, which he did.

After settling all his known and admitted liabilities, he had a balance left, and thereupon applied by petition for the ascertainment of claims and directions as to its distribution. This court, in April, 1870, ordered advertisements for claims against the receiver, and a reference to ascertain the same. The Ohio court, in June, 1870, directed like advertisements for claims in Ohio. Claims were presented there. Some were allowed; others disallowed. Those allowed were ordered paid by this court, and were paid. Various claims were allowed in New York, and have all been paid.

Beyond, however, the claims against the receiver himself, there were also claims by creditors of the company, entitled, under the provisions of the order appointing the receiver, to be paid out of the fund in his hands. There were also divers claimants for the surplus of the fund.

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Three claims only are involved in the present appeal, viz.:

One of Messrs. Naylor & Company, of New York, for steel frogs furnished to the company and to the receiver for \$2,886 gold and \$92.46 currency. The facts with relation to this claim, as found by the referee, are as follows:

"Prior to the appointment of the receiver, the Atlantic and Great Western Railway Company ordered of Messrs. Naylor & Company two hundred of reversible steel frogs to correspond in all respects with a certain steel frog it had theretofore received and was then using (and which proved to be a good and serviceable article), except in the matter of the length of the frogs, which was to vary slightly from the sample. Naylor & Company sent an order to Vickers & Company, of England, to manufacture the frogs according to the said pattern, that firm having manufactured the frog already in use.

"Seventy-five of the frogs were furnished to the company, upon its orders, between the 1st day of August, 1866, and the 1st day of January, 1869. Twenty-two of the said frogs were delivered to the receiver on, or shortly after, the 27th day of May, 1867.

"Naylor & Company presented bills for said frogs to the receiver in their own names as vendors.

"Most of the frogs, except the sample frog, were found to be brittle, and they did in fact break within a short period after being placed upon the road. They were then of no value for the purpose for which they were ordered.

"After being broken, the railway company, without offering to return them, sold the broken pieces for old iron, and as such they were worth about half of one cent per pound.

"There was nothing in the general appearance of the frogs before use, nor any thing discoverable from a particular examination of them, to show what was their real condition, which could only be tested by actual use."

The second claim was that of Jeremiah S. Black, Esq., for legal services as counsel rendered to the railway company at various times, and amounted to \$5,000.

The third claim was that of the firm of Turquand, Youngs & Company, of London, England, for \$20,000, for services as accountants. They performed these services for the company at the request of Mr. James McHenry, the president of the company and its financial agent in London. In settlement of this claim, McHenry had

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given to the firm four bills, drawn by him on the railway company, which bills were never paid.

The referee held, in respect to the claim of Naylor & Company, that there was no presumption that, because a single frog broke the remainder would do so, and that the company had a right, notwithstanding the fact that one or more frogs may have broken within a very short time after being laid down, to lay down and use the remainder as being necessary in their business. He found that they had no claim on the receiver under the original contract for the frogs delivered; yet, as against the railway company, they might, under the provisions of the order appointing the receiver, and the conclusions arrived at by him as to the ultimate ownership of the fund, be entitled to recover the real value of the frogs delivered, and estimated the amount to which they were entitled to be, \$2,410.54 in gold and \$450.34 in currency.

The claim of Mr. Black was disallowed, upon the ground that he was neither a "laborer" nor "employee" of the company within the terms of the order appointing the receiver. The referee, however, decided the claim to be reasonable in amount and due from the company.

The claim of Turquand, Youngs & Company was held to be regular, the firm having been regular accountants of the company, and the claim, and the propriety of its being paid out of the fund, being admitted by the company, the sum of \$20,000 was allowed, but without interest.

Naylor & Co. excepted to the finding of the referee, allowing their claim *in part* only, Jeremiah S. Black to the disallowance of his claim, and Turquand & Co. to the non-allowance of interest upon their claim.

The court, upon the hearing at special term, sustained the exceptions of Naylor & Co., and directed the payment of their claim in full. It also ordered that the amount due for frogs delivered to the receiver after he took possession of the road, and interest, be made a primary charge upon the fund.

The exception of Turquand, Youngs & Co., in relation to the non-allowance of interest, was sustained, and the receiver was directed to pay them the amount due, with interest, out of the fund, if any remained after the payment of Naylor & Co., and some others in full.

The exceptions taken by Jeremiah S. Black were overruled, and  
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the report of the referee sustained, the court holding, however, that Mr. Black was an "employee" of the company, but sustaining the finding in the report on the ground that his services were not "actually" performed in "connection" with the railways.

Appeals were taken from the order of the special term by Turquand, Youngs & Co., by Jeremiah S. Black and by Reuben Hitchcock, who had, in actions to enforce the payment of a mortgage upon the railway in question, been appointed receiver, and who claimed an interest in the surplus funds in the hands of receiver Potter.

*Clarkson N. Potter*, for Turquand, Youngs & Co.

*Jeremiah S. Black*, in pro. pers.

*W. W. McFarland*, for Reuben Hitchcock, receiver. (As to claim of Naylor & Co.) A sale of an article by sample and pattern implies a warranty of quality corresponding to the quality of the sample. *Benj. on Sales*, 482, 483; *Russell v. Nicolopulo*, 8 C. B., N. S., 362; *Gallagher v. Waring*, 9 Wend. 26; *Waring v. Mason*, 18 id. 425; *Moses v. Mead*, 1 Denio, 386; *Oneida Manuf. Society v. Lawrence*, 4 Cow. 440; *Hart v. Wright*, 17 Wend. 274; *Beirne v. Dord*, 5 N. Y. 98.

Upon executory contracts for the delivery of a thing to be manufactured, there is an implied warranty that it shall be of fair quality and merchantable, and upon the sale of an article for a particular purpose, there is an implied warranty that it shall be fit and suitable for that purpose. *Benj. on Sales*, 488; *Brown v. Edgington*, 2 M. & G. 279; *Jones v. Bright*, 5 Bing. 533; *Laing v. Fidgeon*, 4 Campb. 169; *Hallis v. Claridge*, 4 Taunt. 808; *Shepherd v. Pybus*, 3 M. & G. 868; *Hoe v. Sandborn*, 21 N. Y. 561; 3 Kent's Com. 663, note; *Prentice v. Dike*, 6 Duer, 223; *Park v. Morris*, 4 Lans. 104.

A sale of articles affecting human life implies *per se* a warranty of soundness. *Van Bracklin v. Fonda*, 12 Johns. 468; *Wright v. Hart*, 18 Wend. 456.

*Vose & McDaniel* and *Everett P. Wheeler*, for Naylor & Co.

TALCOTT, J. [*Appeal against the allowance of the claim of Naylor & Co.*] The frogs in question were ordered of Messrs. Naylor & Co. by four different orders made at different times. By



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each order twenty-five frogs were directed to be furnished to the company. Three orders were made by the company, on each of which orders twenty-five frogs were delivered, and one order by the receiver on which twenty-two frogs were delivered and received without objection that the order was not complied with as to the number. The frogs were received and used by the company and receiver without objection or any offer to return. This, under ordinary circumstances, would preclude any objection on the part of the vendee that the quality of the frogs did not fulfill the requisites of the orders, according to the case of *Reed v. Randall*, 29 N. Y. 358, and other kindred cases referred to by the respective counsel. The referee, however, has found as facts that there was nothing in the general appearance of the frogs before use, nor any thing discoverable from a particular examination of them to show what was their real condition, which could only be tested by actual use, and that there was no presumption that because a single frog broke in using, the remainder would do so, and he held "that the company had a right, notwithstanding the fact that one or more frogs may have broken within a very short time after being laid down, to lay down and use the remainder as being necessary in their business."

We concede that the rule applied in the case of *Reed v. Randall* is not applicable until the vendee has had a reasonable opportunity to know or ascertain, by the methods necessary for that purpose, whether the articles delivered under an executory contract of sale comply with the contract. Such is the admitted doctrine of the cases referred to. But the error of the referee consists, as we think, in supposing and holding in effect that, where several pieces of a particular description of goods have been ordered by one order, so as to constitute but one contract of sale for the whole number, the vendee has a right to retain a part and reject the residue as not being in compliance with the contract as to quality. The right to reject goods delivered or tendered under an executory contract of sale and purchase, on the ground of the insufficiency of the quality, results from the fact that goods of a different kind or inferior quality were not contracted for, and the offer or delivery of such different or inferior articles is not in pursuance of the contract, and the default of the vendor is that he has not performed, or offered to perform, the contract of sale and purchase actually made between the parties. Under an express warranty different rights arise. The vendee is not obliged to return or offer to return the property, but

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may retain and use it, and have recourse against the vendor for all damages sustained in consequence of the quality of the article being inferior to that warranted, and, therefore, in such a case as this, under an express warranty the railroad company might have received and used all the frogs, and, if any of them proved defective and inferior to the quality warranted, have been entitled to recover of the vendors the damages sustained by reason of the defective quality of such of the frogs as proved deficient. But the vendee has no right to divide the contract and reject a portion of the attempted performance, while he receives and appropriates the residue. In this case there were four several executory contracts for twenty-five frogs each. Each of these contracts was entire and indivisible, except by the consent of both parties. When, therefore, the vendee discovered that one or more of the frogs delivered under any of these contracts was not in compliance with the contract, but was defective in quality, if he wished to reject any of the articles delivered under that contract, the duty devolved upon him of notifying the vendor of the alleged defect, and returning, or offering to return, all the frogs embraced in that contract. The referee proceeded upon the opposite theory, and held that as it was for the convenience of the vendee to retain and use a part of the articles delivered, he might, at his option, divide the contract, keep a part of the articles upon the contract, and reject the residue because not in compliance with the contract. This, we think, the vendee cannot do. If the contract has been complied with, the vendee gets title to all the articles embraced in it, if not, and the vendee on that ground repudiates the attempted performance, he gets title to none. This principle may, in certain cases, be productive of inconvenience to the vendee. Where this is apprehended, he can easily guard himself against the operation of the rule by the terms of his contract. If he neglects to do this, he must put up with the inconvenience. He cannot make a different contract for the vendor from that which the latter has consented to enter into.

The order of the special term, therefore, allowing the claim of Naylor & Co. at the full amount of the contract price for the frogs delivered is affirmed.

[APPEAL OF JEREMIAH S. BLACK, Esq.]

The appellant was employed as casual and extraordinary counsel of the railway company in various cases, and presents a claim upon the

fund in the hands of the receiver for the balance found to be justly due him from the company on account of counsel fees in such cases. The rights of the appellant depend, as is conceded, wholly upon the provisions of the order under which the fund comes to the hands of the receiver. The first provision of the order, as to the disposition of the funds which may come to the receiver's hands, is as follows, viz.:

"First. Any arrearages that may be due and owing for taxes and public assessments, on any of said mortgaged property, or owing to the *laborers and employees* of the said consolidated corporation defendants for labor and services actually done in connection with that company's railways, or to connecting roads on freight or passenger accounts in the ordinary course of business." It is upon this provision of the order that the appellant founds his claim, to be paid out of the fund in the hands of the receiver, and he claims that as such counsel as aforesaid, he was an "employee" of the company within the meaning of the order.

In this, we think, he is mistaken. The word "employee" is from the French, but has become somewhat naturalized in our language. Strictly and etymologically it means "a person employed;" but in practice in the French language, it ordinarily is used to signify a person in some official employment, and as generally used with us, though, perhaps, not confined to any official employment, it is understood to mean some permanent employment or position. Associated as it is with the word "laborers," and especially limited to services actually done in connection with the company's railways, and by the rule *noscitur a sociis*, applied to a similar question in *Aikin v. Wasson*, 24 N. Y. 482, there can be little doubt that the court making the order designed to limit the operation of the word to such servants of the company as were usually engaged in the construction, operation and maintenance of the company's railways, a class of persons, as is said by the court in *Ericsson v. Brown*, 38 Barb. 390, who are not well qualified to protect themselves, usually labor for a small compensation, and are deemed, to a certain extent, to be in the power of the employer. And also to those to whom the withholding of their dues, though small in individual cases, would produce a large amount of distress; and who, from ignorance of laws and legal proceedings, and moved by their common necessities and vague, but acute sense of wrong, may be led to proceedings of a riotous character, endangering the property which the interest of all concerned requires should be pro-

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tected and preserved. We think it quite clear that the appellant was not designed by the order to be embraced in that class of persons therein described as "laborers and employees," the debts due to whom the receiver was directed to first pay.

And, accordingly, we must affirm the order disallowing the debt due to the appellant Black, as a specific claim against the fund in the hands of the receiver.

[CLAIM OF TURQUAND, YOUNGS & COMPANY.]

Turquand, Youngs & Co., professional accountants, in London, were employed by the railway company in auditing the accounts and keeping the books of the company in London, and reporting upon the affairs thereof, for a certain space of time, for which services there became due to them from the company a sum liquidated at \$20,000. Five thousand dollars of this was paid by the company, and the balance was allowed by the referee in this proceeding. The payment of the claim of Turquand, Youngs & Co. was by the special term postponed to the claim of Naylor & Co., and from so much of the order of the special term as allows the claim of Naylor & Co., and from so much as postpones the lien of Turquand, Youngs & Co. to that of Naylor & Co., Turquand, Youngs & Co. appeal.

As to the allowance of the claim of Naylor & Co., our views have already been expressed. We consider the order of the special term, postponing Turquand, Youngs & Co. to Naylor & Co., to be correct, for the following reasons:

The second provision of the order, under which the fund came to the hands of the receiver, directs him to pay out of it secondly, "Such sums as may remain actually due for materials and supplies, furnished said consolidated company defendants for the use of its railways," not exceeding in the aggregate the amount of materials and supplies which may be delivered by the company to the receiver. The claims of Naylor & Co. come within this description, as to the first two parcels of frogs. And as to those delivered to the receiver, who by the order is authorized to operate the road, of course they are to be paid out of the fund. The claim of Turquand, Youngs & Co. is not provided for by the order, or in any way made a specific lien on the fund. The only ground upon which the claim was allowed by the referee is, that the railway company had admitted the claim, and specifically appropriated its interest in the

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fund to its payment. The interest of the company was subordinate to the specific lien created by the order. The postponement, therefore, so far as this fund is concerned, of the claim of Turquand, Youngs & Co. to that of Naylor & Co., seems to be in accordance with the equitable rights of the parties.

We think, therefore, that the order appealed from should be, in all particulars, affirmed with \$10 costs on each appeal, to be paid out of the fund.

*Order affirmed.*

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## WRIGHT V. PUTNAM.

*Tenants in common—liability of tenant to co-tenant for improvements to land held in common—admission of and promise to pay.*

Plaintiff, defendant and others were shareholders in a joint-stock enterprise to purchase and improve lands containing a mineral spring, and held such lands as tenants in common. Plaintiff made and paid for certain improvements, and assessed the cost, ratably, upon each shareholder. Plaintiff proved that he made a statement to defendant of the amount assessed upon him; that defendant took the figures on a paper, and said he "would pay him (plaintiff) the money;" would "be over in a few days and settle up—square up." *Held*, that the admission of a liability, coupled with a promise to pay, was sufficient to authorize a recovery by plaintiff against defendant.

THIS is an action to recover for moneys laid out and expended by the plaintiff upon nine acres of land, upon which there was a mineral spring called the Crystal spring, and which the parties owned as tenants in common with others.

The cause was tried at the circuit in Yates county, and the plaintiff was nonsuited, to which decision the plaintiff duly excepted, and the circuit judge ordered that the exceptions be heard in the first instance at the general term.

*D. Morris*, for plaintiff.

*Chas. S. Baker*, for defendant.

E. DARWIN SMITH, J. The circuit judge, we think, erred in taking this case from the jury.

The plaintiff and defendant, as the proofs showed, were shareholders in a species of joint-stock enterprise to purchase, hold and

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improve nine acres of land, upon which was situated a mineral spring called the Crystal spring.

The stock of said company was divided into forty shares, and of these shares the defendant owned three. In the years 1866 and 1867, the plaintiff proved that erections and improvements were made on the land of the company, at an expense of about \$6,800, by the plaintiff; that in August, 1867, the said plaintiff, with one Benson Smith, another shareholder in said company, made an estimate or statement, in writing, of such expense as between the shareholders, making it amount to the sum of \$158.94 to each share in said company; that they exhibited to the defendant, who owned three shares of said company, such statement, and asked him to pay the amount assessed upon his three shares of \$475.62, and \$20 assessment on one share after March 1st, amounting to \$495.90; that the defendant took the figures on a piece of paper, and said he would pay him the money; would be over in a few days and settle up—square up. This was proved in substance by two witnesses. If the jury believed this testimony, and that there was at this time a distinct admission or recognition by the defendant of his liability to pay this amount, coupled with a promise to pay it, we do not see why they would not have been bound to find a verdict for the plaintiff for such amount with interest.

Even as between partners in ordinary partnerships, proof of a settlement between them, with a promise by one to pay the other a balance struck, would warrant and sustain a recovery at law. *Clark v. Dibble*, 16 Wend. 601; *Powell v. Noye*, 23 Barb. 186; *Koehler v. Brown*, 31 How. 235.

There should be a new trial, with costs to abide the event.

*New trial granted.*

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WHIPPLE, appellant, v. WALKER.

*Promissory note—partial payment—what is not.*

Plaintiff left a note made by defendant for \$55.17 at a bank for collection. The note was not paid when due. After it had been overdue some days, and was still in possession of the bank, defendant's agent deposited with the bank a draft for \$20, directing that the same, when collected, be applied upon the note. The avails of the draft were credited to the agent and the note unpaid returned to plaintiff. *Held*, that the transaction between the agent and bank did not constitute a part payment of the note.

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**APPEAL** from a judgment entered upon the report of a referee.

The action was brought upon a promissory note given by the defendant, Lois T. Walker, to the plaintiff, William D. Whipple, on July 31, 1869, for \$55.17 and interest. The note was made payable at the bank of Williams & Remington, in Canandaigua, N. Y., where it was left by plaintiff, after the usual custom of business men, to enable the bank to receive payment of it. It became due on the 3d of September, when it was protested for non-payment, and was afterward returned unpaid to plaintiff, who brought this suit to recover the amount of it.

Defendant claimed to have made a partial payment on the note. Mr. Spencer Gooding, who is her attorney in this action, about September 20, called at the bank and asked for "the Whipple note." The note in question was produced and shown to him. He, within a day or two afterward, deposited in the bank a draft of \$20, made by him on S. H. Tate, of Williamsport, and directed the teller to collect it and apply upon this note. The draft was collected and the avails credited to Gooding, by whom they were subsequently checked out.

The referee found that this transaction of Gooding with the bank constituted a partial payment of the note, and gave judgment in favor of the defendant for costs, deducting from the amount the unpaid balance of the note.

*D. G. Lapham*, for appellant.

*Spencer Gooding*, for respondent.

**E. DARWIN SMITH, J.** We think the referee erred in deducting the proceeds of the Tate draft from the amount of the plaintiff's recovery.

This draft was collected by the bank, not as agent of the plaintiff, but as agent of Spencer Gooding, the defendant's attorney, and passed to his credit in account in the books of the bank and paid to him.

The plaintiff had nothing to do with it, and the said draft or the moneys collected on it at no time became the property of the plaintiff. The bank was simply intrusted by the plaintiff with the note of the defendant for collection, and had no power to bind the plaintiff by any contracts to receive any thing but money in pay-

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ment thereof, or to do with said note any thing else but to receive payment of it in cash.

The judgment must be reversed, and a new trial granted with costs to abide the event.

*Judgment reversed.*

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DOHRING, plaintiff in error, v. PEOPLE.

*Constitutional law — State constitution, art. 6, § 13 — justices of peace not limited as to age — justice de facto — acts of, when valid — justice of sessions as witness.*

Justices of the peace are not within the provision of the constitution (art. 6, § 13) limiting the tenure of judicial office to seventy years of age.

Accordingly, where a justice of the peace who had been chosen after reaching seventy years sat as a justice of sessions at a criminal trial, *held*, that the conviction of the prisoner could not, for that reason, be avoided.

*Held*, also, that even if the justice was not such *de jure*, he was *de facto*, and the conviction was valid.

A justice of the sessions, while sitting at a trial, was called as a witness in the cause, and gave material testimony. *Held*, that, while the justice was thus acting as a witness, the court was disorganized, and a conviction upon that trial was irregular.

CERTIORARI to the court of sessions of Niagara county, bringing up the record and proceedings upon the trial of the plaintiff in error upon an indictment for a rape.

The plaintiff in error was tried and convicted in the Niagara county court of sessions on the 27th day of December, 1871, and sentenced to imprisonment for the term of six years and six months. On the 28th of December a writ of error was allowed and a stay of proceedings by Mr. Justice TALCOTT, directed to the Niagara court of sessions.

The return to the writ was not sufficiently full, and a writ of *certiorari* was issued. By the return to that writ it appeared that Alden S. Baker, one of the justices of the said court of sessions, was, when elected justice of the peace in 1870, over seventy years of age, upon the ground of which fact plaintiff in error, before sentence, moved an arrest of judgment, claiming that the court was not a legally constituted court of sessions, by reason of the disability



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of said Baker to sit. During the trial said Baker was called and sworn as a witness by both the prisoner and the people, and gave some testimony.

*W. S. Farnell*, for plaintiff in error.

*M. F. Southworth*, district-attorney of Niagara, for the people.

E. DARWIN SMITH, J. When, after conviction, the prisoner, the plaintiff in error, was brought up for sentence, a motion was made by his counsel in arrest of judgment, upon affidavits showing that one member of the court of sessions was elected a justice of the peace in April, 1870, being then upward of seventy years of age, and was at the November general election following elected a justice of the sessions for said county of Niagara, and insisted that for that reason the said court of sessions was not properly constituted, and that the proceedings upon the trial and the conviction were void. The provisions in the 13th section of article 6 of the constitution as amended in 1869, that "no person shall hold the office of justice or judge of any court longer than until and including the last day of December next after he shall be seventy years of age," does not, I think, apply to justices of the peace. They are not within the purview or intent of the provision. This provision relates to the judges and justices of the court of appeals, justices of the supreme and superior and city courts. Two justices of the peace in each county designated for that purpose according to law, are authorized to sit in the courts of oyer and terminer and sessions; but they sit there by virtue of their election as justices of the peace and not as judges of such courts.

Judge FOLGER, in *People v. Gardner*, 45 N. Y. 820, shows the reason and intent of this provision. He was in the convention and chairman of the committee on the judiciary which devised and reported the amended article to the convention. He shows that it was intended to impose a limit to the enlarged terms of the judges of the higher courts of the State mentioned in said amended article.

But if it were doubtful whether Baker was a proper member of the court as a *de jure* justice of the peace, he was a *de facto* justice and member of said court, and the conviction was, therefore, valid, within the cases of *Nelson v. People*, 23 N. Y. 296, and *People v. White*, 24 Wend. 525.

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But we are nevertheless of the opinion that the motion in arrest of judgment ought to have been granted, upon the ground and for the reason that the said Justice Baker was called and sworn as a witness in the cause, and gave substantial testimony during the progress of the trial. While he was upon the witness stand, to which he was several times called, there was no lawfully constituted court for the trial of the cause. It was disorganized by calling him from the bench and subjecting him to examination as a witness. There was, while he was thus occupying the stand as a witness, no court to pass upon the questions relating to the admissibility of evidence or any other question — there was, in fact, no court of sessions. This must be composed of the county judge and two justices. This fact was well known to the court of sessions, and distinctly appears upon the record in the exceptions before us.

And we think for this reason the conviction was irregular, and that the same must be reversed and a new trial granted, and the case and proceedings remitted to the court of sessions for that purpose.

*Conviction reversed and new trial granted.*

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SOVERHILL v. SUYDAM, appellant.

*Interest — computation by referee — Executor — debt of, to estate — when judgment debt not discharged.*

A referee was appointed to determine upon the priority and amount of claims to surplus moneys. He computed the claims with interest to the day of the date of his report. The special term affirmed the report, and did not postpone the day to which interest should be computed thereon. *Held*, that the general term would not review the order of the special term, it having exercised the discretion vested in it.

A judgment debtor was appointed executor by the will of his judgment creditor. *Held*, that neither the debt nor the judgment was discharged by such appointment. By the law as modified by the Revised Statutes: (1) In no case is the debt of the executor discharged by his appointment as such by the will of his creditor. (2) Nor can such an appointment operate as a bequest of the debt to the debtor. (3) Legatees and next of kin are entitled to share in the debt as assets in the hands of the executors. (4) A judgment is assets in the hands of the executor, but, as he cannot be sued at law, it is by the statute converted into money, and he is bound to dispose of it as such.

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APPEAL from an order confirming the report of a referee as to surplus moneys and directing the distribution of the same.

The suit was brought to foreclose a mortgage made by the defendant, Hiram L. Suydam and his wife. The suit proceeded to judgment and the mortgaged premises were sold and a surplus of \$9,609.39 realized.

Several parties having liens upon the mortgaged premises, filed claims to the surplus, and a reference was ordered to determine the priority of such claims. Among these claims was a mortgage held by Henry Savage as trustee for Elizabeth Suydam, which was conceded by all parties to be the oldest lien. Upon this there was unpaid \$7,380.38, with interest from February 7, 1867, amounting on the 15th of February, 1870, to \$8,938.88. It was agreed between the parties that the referee holding the surplus moneys should pay upon this mortgage \$8,000, and hold the balance claimed until the priorities of the other claimants should be determined. The \$8,000 was paid to said trustee Savage, February 20, 1870.

The referee appointed to determine priority among claims, made his final report August 23, 1871, in which appear, among other things, the following facts:

On the 11th day of February, 1867, Hiram L. Suydam confessed judgment for \$5,600 in favor of Ann Suydam for debts due her. On the same day the judgment was docketed in Ontario county (in which the premises sold in the foreclosure suit are situated), and execution issued to the sheriff of that county. A few days afterward judgments against Hiram L. Suydam in favor of other parties were docketed in the same county. These judgments, with interest, amounted at the date of the referee's report, to between \$400 and \$500, and were presented as claims upon the surplus fund. Ann Suydam on the 12th of February, 1867, made her last will and testament, wherein she named Hiram L. Suydam her sole executor and trustee to carry out the provisions of the will, and on the 29th of March following, died. The will was duly proved and the said executor qualified. Thereafter the sheriff finding no personal property of Hiram L. Suydam, levied, under the above-named execution, upon his real estate, including the mortgaged premises in question, and on the 12th of July, 1867, sold the same, it being bid off by said Hiram L. Suydam as executor under said will of the judgment creditor. On the 21st of July, 1869, the sheriff executed a deed of said premises to said Suydam, as such executor.

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The referee found that the trustee Savage was entitled, over and above the \$8,000 paid him, to receive on the 15th of February, 1870, \$938.88. He also found that by the appointment of Hiram L. Suydam as executor in her will, the judgment in favor of Ann Suydam became extinguished and ceased to exist as a lien upon the lands of Hiram L. Suydam, and the claim became, by the statute, money in the hands of the executor, and that all proceedings under the judgment to enforce it after the death of Ann Suydam, were void. He also found that the judgments against Hiram L. Suydam, other than that in favor of Ann Suydam, were liens in the order of their docketing, upon the surplus fund remaining after payment of the mortgage held by Savage.

The *cestui que trusts* under the will of Ann Suydam, filed a claim for the whole surplus remaining after the payment of said mortgage, and excepted to the finding of the referee that the judgment in favor of their testator was extinguished. The other judgment creditors of Hiram L. Suydam excepted to the finding in favor of the priority of the Savage mortgage.

The payment of the \$8,000 made in 1870 on the Savage mortgage, was not indorsed on the bond accompanying such mortgage, until November, 1871, when a motion was made to the court and an order granted to compel such indorsement, and also the filing of the referee's report, which the attorneys for Savage and Hiram L. Suydam held in their hands and neglected to file.

The court at special term confirmed the referee's report and directed the payment to Savage of \$1,048.52, being the amount due on the mortgage, with interest *to the date of the referee's report*, and out of the surplus remaining thereafter, to pay the judgment creditors on judgments other than that in favor of Ann Suydam in their order, holding that the decision of the referee as to the extinguishment of the last-named judgment was correct.

From the order of the special term appeals were taken by Hiram L. Suydam individually and as executor and trustee and the *cestui que trusts*, upon the grounds named in the exceptions made by the *cestui que trusts*, and by Henry Savage, trustee, upon the ground that interest had been allowed upon the unpaid balance of his mortgage only to the date of the referee's report, and not to the time of making the order confirming such report.

The case was argued upon the appeal of Savage before the general term of the Fourth department, and a decision rendered in April,

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1873. In the opinion delivered by MULLIN, P. J., at that time only the question of the allowance of interest was passed upon, the court holding that the other point was not before it. In respect to the allowance of interest, it was held that the special term might properly direct that interest should not be collected on the mortgage of Savage subsequent to the date of the referee's report, by reason of the laches of the attorneys of Savage in not filing the report or indorsing the payment made on the mortgage, thus obliging the other creditors to apply to the court to have the same done.

*Angus McDonald*, for appellants, Hiram L. Suydam and others.

*Baldwin & Backenstoss*, for respondents, the judgment creditors of H. L. Suydam.

MULLIN, P. J. The argument and brief of the appellant's counsel has not satisfied me that the views heretofore expressed on the question of interest were erroneous. In this case there were claimants to the extent of the whole funds. The referee, who held the surplus moneys, was entitled to the protection of an order of the court in favor of each person claiming a share of such moneys. To enable the court to distribute the whole fund, some day must be fixed upon to which interest should be computed on all the claims, and that is usually the day of the date of the report of the referee as to priority, etc., of claims on the surplus. When his report is made, his power over the subject ends, and the court must thereafter postpone the day to which interest shall be computed, if justice to the claimants requires it to be postponed.

The court has not changed the day, and it is not for us, on this appeal, to review the exercise of the discretion vested in the special term.

The argument of the respondent's counsel has failed to satisfy us that the appointment of Hiram L. Suydam, the judgment debtor, executor of his wife, the judgment creditor, discharged or satisfied the judgment. On the contrary, we are still of the opinion heretofore expressed, that the judgment was not satisfied or discharged by such appointment.

In this State, before the Revised Statutes, the law was well settled, that if a creditor appointed his debtor his sole executor, or one of his executors, and the debtor accepted the trust, this operated as

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a release or extinguishment of the debt. *Marvin v. Stone*, 2 Cow. 781; *Gardner v. Miller*, 19 Johns. 188.

The rule was subject to this qualification, that when there was a deficiency of assets to pay debts, the debt due from the executor was not discharged, but was considered a part of such assets.

In the latter case, it was in judgment of law paid to the debtor executor, and was considered money in his hands. Whenever, from the whole will, it appeared that the testator did not intend to discharge the debt by making his debtor executor, the latter was a trustee of the debt for the legatee or next of kin.

The reason for the adoption of the general rule above stated was that, by the appointment of the debtor as executor, the same person occupied relations of both debtor and creditor, and as he could not sue himself nor be sued by his co-executors, the debt was necessarily extinguished.

The rule operated so unjustly, that the courts sometimes strained a point to get rid of it, as was done in *Gardner v. Miller*, 19 Johns. 188.

A rule somewhat different prevailed in the courts of equity. The general rule there was, that the debtor executor was accountable for the amount of his debts as assets, not only for the payment of the testator's debts, but also of his legacies. And if the debt was a specialty debt, it remained such, and retained its priority as against the estate of the debtor, in the event of his death, as though a stranger had been appointed executor. 2 Williams on Ex'rs, 1184, 1185.

In the opinion of the learned author, it was not definitely decided whether the debt of the executor was not a specific legacy to him, which would not be reduced in case of deficiency of assets to pay debts until the general legacies had been extinguished.

By 3 R. S. (5th ed.) 170, § 14, it is enacted, that "The naming of any person executor in a will shall not operate as a discharge or bequest of any just claim which the testator had against such executor, but such claim shall be included among the credits and effects of the deceased in the inventory, and such executor shall be liable for the same as for so much money in his hands at the time such debt or demand becomes due, and he shall apply and distribute the same in the payment of debts and legacies, and among the next of kin as part of the personal estate of the deceased."

The revisers, in their note to this section, say "The debt of an

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executor is now liable to creditors, and, in some cases, to legatees; but, when not required for these purposes, it is discharged or belongs to the executors, and is not to be distributed among the next of kin, unless it appear on the face of the will that the testator did not intend to discharge the debt." And they say the object of this section, as reported, was "to avoid the disputes that arise, and to establish what is believed a just rule."

It will be seen, by comparing section 14 of the Revised Statutes, above quoted, with the rule theretofore in force as to the condition of a debt due from a person indebted to a testator, of whose will the debtor is appointed executor, that the following important changes and modifications were made in the law by said section:

1st. In no case and in no court is the debt of the executor discharged by his appointment as such by the will of his creditor.

2d. In no case and in no court can such appointment operate as a *bequest* of the debt to the debtor.

3d. Legatees and next of kin are entitled to share in the debt as assets, or rather in the money the product of the debt, in the hands of the executors.

4th. A judgment is assets in the hands of the executor; but, as he cannot be sued at law, it is, by the statute, converted into money, and he is bound to dispose of it as such.

The judgment against this executor was the debt, and the debt not being discharged, the judgment remains in force; and if the money is not, in fact, in the hands of the executors, its lien continues in favor of the creditors, next of kin and legatees of the testator.

All that remains of the old rule is, that at law the executor cannot be sued, and hence the necessity of making him liable for so much money and obliging him to appropriate it to the payment of debts, legacies, etc.

In equity, one executor may sue another and recover a debt due by him to their testator. *Smith v. Lawrence*, 11 Paige, 207; *Wurts v. Jenkins*, 11 Barb. 546. In the case last cited, it was held that two of the executors of James Jenkins might maintain an action in equity against their co-executor, to recover of him a debt due from him to the estate of the testator, to be applied in payment of advances made by the plaintiff for the estate.

If the plaintiffs were entitled to a judgment for the money, will it be claimed they could not have also the benefit of a mortgage or other security held by the testator as security for the debt? If the

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executor sued was insolvent, so that the judgment could not be enforced against him, but the collateral security was ample to satisfy the debt, would any court be guilty of the absurdity of holding the collateral security discharged, and yet issue process to collect the debt out of other property of the debtor.

The debt is not discharged unless the debtor's executor applies the amount of his indebtedness in payment of claims against his testator, in due course of administration. If he refuses or is unable to pay, the debt he owes the testator still exists, and may be sued for and its payment enforced, and any security held therefor may be applied to the payment of such debt.

The creditors of the testator, the legatee or the next of kin, may maintain an action in equity for that purpose, but at law the debt is to be deemed collected, and the money may be applied in payment of the debts or legacies of the testator by any court having jurisdiction to compel the executors to account.

I can perceive no distinction in principle between the liability of an executor for an indebtedness to his testator, and a trustee of an express trust for a debt to the person creating the trust.

If a trustee has transferred to him property of his grantor, including a debt due from himself, and he is required to apply the property or its avails to the payment of debts or other uses, it would not be tolerated that a mortgage or judgment, held as collateral to the debt, should be discharged because he could not sue himself. In the case supposed there would be what was deemed quite material before the Revised Statutes: evidence of an intention on the face of the conveyance in trust not to discharge the debt. But, since the adoption of those statutes, intention has nothing to do with the question whether the debt of an executor is discharged by his appointment as executor. It seems to me the section of the statute referred to is conclusive, that neither the debt of the executor nor any security collateral thereto is discharged by his appointment.

The order appealed from must be affirmed as to the interest, and reversed as to the judgment being discharged by the appointment of the debtor executor of the creditor's will, with \$10 costs of appeal.

*Ordered accordingly.*



HILL v. GRANT *et al.*, appellants.

*Action — costs of former action unpaid — stay of proceedings.*

H. brought action against G. and others, to have set aside as fraudulent the conveyance of certain real estate to G. The complaint was dismissed as to G., with costs against H. Afterward G. sold the real estate to D., and H. assigned his claim to plaintiff, who brought action upon the same subject-matter as the former suit against D., G. and others. *Held*, that the defendants D. and G. were entitled to have the proceedings in this action stayed as to both, until the costs of the former action were paid.

APPEAL from the order of the special term held in Erie county, July 25, 1873, staying proceedings on the part of plaintiff, as against part of the defendants, and not as against the others.

The action is in the nature of a creditor's suit, brought by plaintiff, as assignee of a judgment recovered by one Hovey against the defendant Milo W. Hill, in 1856.

During the year 1865, said Hovey brought action against said Milo D. Hill, Lydia C. Grant, Lester Day and others, claiming that Lydia C. Grant held certain leasehold estate in the city of Buffalo in fraud of the creditors of said Hill. That action was defended and the complaint was dismissed as to the defendants therein, Lydia C. Grant and Lester Day, and a judgment was entered in 1868 against Hovey, for costs in their favor. These costs have never been paid, but the judgment therefor remains in force.

About May 1, 1873, the estate in question was conveyed to Mary E. Day by said Lydia C. Grant.

This action was commenced in June, 1873, and Milo Hill, Lydia C. Grant, Mary E. Day and Elbridge G. Spaulding (from whom said Grant took title) made defendants. The defendants, Grant and Day, moved the court at special term for a stay of proceedings in this action, as against them, until the costs of the former action should be paid with interest. The court made an order staying proceedings as against the defendant Grant, but not as against defendant Day. From this order both said defendants appealed, upon the ground that proceedings should have been stayed as to both.

*L. P. & E. B. Perkins*, for appellants, cited *Edwards v. Ninth Av. R. R. Co.*, 22 How. 444; *Dunlap's Pr.* 337; *Adams on Eject.* 320;

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*Jackson v. Edwards*, 1 Cow. 138; *Perkins v. Hinman*, 19 Johns. 237; *Jackson v. Carpenter*, 3 Cow. 22; *Jackson v. Miller*, id. 57; *Ex parte Stone*, id. 380; *Muir v. Desmarest*, 9 Wend. 449; *Kentish v. Tatham*, 6 Hill, 372; *Post v. Haight*, 2 How. 32; *Dresser v. Brooks*, 5 id. 75; *Richardson v. White*, 27 id. 155; *Kerr v. Davis*, 7 Paige 53; *Roberts v. Carter*, 24 How. 44; *Bush v. Lathrop*, 22 N. Y. 535; Code, § 349, subd. 3.

*Perry G. Parker*, for respondent, cited Code, § 306; *Taylor v. Root*, 48 N. Y. 687; *Tallman v. Cook*, 1 Sweeney, 550; *Schmidt v. Levy*, 61 Barb. 496; *McMahon v. Mut. Benef. Ins. Co.*, 12 Abb. 1228; *Jackson v. Edwards*, 1 Cow. 138; *Simpson v. Brewster*, 9 Paige, 245; *Kerr v. Davis*, 7 id. 53; 2 Till. & Shear. Pr. 351; 2 R. S. 309, § 37.

E. DARWIN SMITH, J. It is the settled rule and practice in this State, asserted in numerous cases, that where one action is discontinued or dismissed with costs, and a second action is brought for the same cause of action by the same plaintiff, or by any assignee of the cause of action, that the proceedings in such second action will be stayed till the costs of the first action are paid. And it matters not that the first action was dismissed for a defect of parties or other causes, and the bringing in of other parties as defendants in the second suit does not change the rule.

This was settled in the case of *Kentish v. Tatham*, 6 Hill, 372. In that case the first action was against two defendants. The plaintiff was nonsuited and judgment obtained against him for costs for a non-joinder of parties. He then commenced the second action against one of the defendants in the first action and two other parties, as defendants. On motion to stay proceedings till the costs of the former action were paid, the same was granted. Judge BRONSON, on the decision of it, saying: "Benjamin Tatham is sued a second time upon the same demand or cause of action, and we think the proceedings should be stayed until the costs of first suit are paid. The fact that some of the defendants are new parties does not take the case out of the operation of the general rule."

That case was the same in principle with this, and the same rule should be applied in this action. Lydia Grant was a defendant in the former action as well as in this, and I think there is the more justice in this rule in this case, in the fact that the plaintiff in the first action is a non-resident, and the defendant Lydia Grant has no

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remedy in this State, at least, for the collection of her costs.

The order of the special term staying proceedings in the suit, so far as relates to the said defendant Lydia Grant, and allowing the action to proceed as to the other defendants, does but imperfect justice. If she is a necessary and proper party in the action, Mrs. Grant ought not to be thus placed in the false position that she must either waive her rights to costs in the former suit, or acquiesce in the prosecution of this suit, and in a decision, perhaps, upon her rights, without the opportunity to be heard in respect to the questions.

It is not just to let a suit proceed as against some of the parties while it is stayed as to the others. A party to an action has the right to appear and participate in all the proceedings in the cause, if he is not bound to do so to protect his own interest. He may not lie by, and in many cases he cannot safely, and suffer a suit to proceed against other parties when his own interest is involved and may be affected by the result of the litigation. The case of *Garnsey v. Knight*, 1 N. Y. Sup. 259, illustrates the peril involved by such a course.

The order of the special term should be reversed, so far as it allows the action to proceed as against the said Mary Day, and the original motion to stay the proceedings till the costs of the former be paid be granted, with \$10 costs of such motion, and \$10 costs of this appeal to this court.

*So ordered.*

# FIRST DEPARTMENT.

GENERAL TERM, JANUARY, 1874.

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TREADWELL v. POMEROY *et al.*, appellants.

*Commission to take testimony out of State—joining of issue—Appealable order.*

When issue is joined as to one of several defendants, a commission may be issued to take testimony out of State, although issue is not joined as to all the defendants.

An order granting a commission in such a case is not appealable.

THIS action is for an accounting between parties claiming to be jointly interested, and comes before the general term on an appeal from an order of special term, granting a commission to take testimony in another State. The defendants, as to whom issue was joined at the time of the granting of the order, object thereto, that issue was not joined as to all the defendants named in the complaint.

*D. T. Walden*, for appellants. The action is not properly "at issue." 2 Paine & Duer's Pr. 103; Graham's Pr. 484; 1 Burrill's Pr. 443; *Davis v. Granger*, 3 Johns. 259; *Hackley v. Patrick*, 2 id. 478; *Allen v. Hendree*, 6 Cow. 400; *Boyd v. Vanderkemp*, 1 Barb. Ch. Pr. 277. The order is appealable. *Rathbone v. Ingersoll*, 2 Jones & S. (34 Super. Ct.) 211.

*Samuel C. Mount*, for respondent. The order is not appealable. *Thatcher v. Bennett*, cited in notes to section 349, Code (Voorhees' ed., p. 555); 1 R. L. 1813, 519, § 11; 1 Cai. 73; 2 id. 259; Laws 1862, ch. 375.

DAVIS, P. J. Issue having been joined by answer, as to one of several defendants in this action, the plaintiff moved, on the usual affidavit, for a commission to take the testimony of a witness resid-

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ing in the State of Kansas. The defendant as to whom the issue is joined objected, on the ground that issue was not also joined as to all the defendants named in the complaint. The court granted the motion, and ordered a commission to issue, providing, however, in the order, that the testimony taken under it should not affect the other defendants. From this order the defendant appeals, insisting that the court has no power to issue a commission until the action is at issue as to all the defendants. Chapter 375 of the Laws of 1862 provides, that "whenever any issue of fact shall have been joined in any such action or proceeding, and it shall appear, on the application of either party, that any witness not residing in this State is material in the prosecution or defense of such action or proceeding, the court may \* \* award a commission \* \* to examine such witness" on interrogatories. This provision does not seem to leave any doubt as to the power of the court, and if there were any question under the Revised Statutes, which we do not think to have been the case, the amendment of 1862, above referred to, wholly removes it. The discretion of the court was properly exercised, but we think the order was not appealable. This court so held in *Thatcher v. Bennett*, cited at page 555 of Voorhees' Annotated Code (edition of 1870). It does not affect prejudicially any substantial right of defendant. On the contrary, it tends to expedite the case, and preserve the evidence on which the substantial rights of both parties may be ascertained and enforced. The appeal should be dismissed with \$10 costs and disbursements.

DANIELS and DONOHUE, JJ., concurred.

*Appeal dismissed.*

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WHITNEY, appellant, v. DENISTON.

*Attachment—undertaking in—court may control.*

An attachment was issued upon an undertaking in the sum of \$1,000, and over \$100,000 was seized thereunder. *Held*, that the court has power to regulate and control undertakings given in applications for provisional remedies, and could in this case require an additional undertaking for a larger sum.

THE complaint alleges that informal notice was received by the defendant that he, defendant, was entitled to a prize of \$500,000, upon

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a ticket held by him in the royal Havana lottery, of Havana, Cuba, payable at Havana; that, in consideration of certain services rendered and to be rendered to him by plaintiff, defendant agreed to pay over to plaintiff one-half of all moneys received from said lottery ticket; that the services were rendered by plaintiff; that defendant received \$410,000 on account of the ticket, and demands judgment for \$205,000. Defendant's answer is a general denial.

An attachment was issued on an undertaking, in the sum of \$1,000, against defendant's property, as a non-resident, and over \$100,000, in the hands of A. Belmont & Co., was attached. A motion was made to vacate the attachment on the merits, which was denied. A motion was then made by defendant that the security be increased, on the ground that it was not sufficient to protect the defendant. On this motion an order was made, at special term, requiring plaintiff to file an additional undertaking, in the sum of \$15,000, and that, in default thereof, the attachment be set aside.\*

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\* NOTE. — The opinion of Judge BARRETT, at special term, was as follows:

The court has no doubt of its power to regulate and control all provisional remedies, even to the extent now invoked. Orders of arrests, attachments and injunctions *pendente lite* are provisional remedies, and not process.

The summons is the process upon which the action proceeds to trial and judgment: attachments, orders of arrest and injunctions are collateral. If suit were commenced by the mere approval of the original undertaking, and the issuing and service of the attachment thereon, the action of the judge, if within the statute, would be final, and the jurisdiction thus acquired, in conformity to law, could not be divested. Here, however, the attachment fails, if not followed up by service or publication of summons within thirty days — the distinction is just there. If publication be ordered and effected in conformity to the statute, the court cannot interfere with such publication. But there is no difficulty in requiring the plaintiff to increase his undertaking upon arrest, when the defendant is in jail and unable to find bail, nor upon continuing an injunction, nor, as here, upon the attachment of a much greater sum than could have been originally contemplated. If the court could have been made aware that more than \$100,000 was about to be attached and held (for a year or two, perhaps, while awaiting a trial upon our crowded calendar), there can be no doubt that a very different undertaking would have been required. The court cannot be said to have found judicially upon the amount of security really required, for the circumstances now disclosed were not before it.

The construction contended for by the plaintiff would justify the holding of millions for years, and that, perhaps, insecurely, upon an undertaking in \$250; there is no such unjust and unreasonable construction to be placed upon the statute, nor is there any analogy between the present case and that of an undertaking on appeal. In the latter case, the old law, which governed the decisions referred to by counsel, gave the stay of proceedings upon justification, whether the sureties turned out to be good, bad or indifferent. This stay the court could not revoke without violating the law. There was no discretion to grant or withhold it. The stay was statutory, and its retention was statutory. The question of the just control by the court of its process or provisional remedies did not and could not arise.

Upon the facts now before the court an undertaking in about \$15,000 would have been required before the granting of an attachment, and an additional undertaking in that amount must be furnished in, say ten days.

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*William F. Shepard and Marsh & Wallis, for appellant.*

*Edwards Pierrepont, for respondent.*

DANIELS, J. The court has general power to discharge attachments the same as all other provisional remedies. Code, § 241. It may be exercised for all proper reasons, including those where, for any cause, the plaintiff's proceedings are in any respect defective, and they certainly are so where the amount of the undertaking is insufficient to indemnify the defendant for the costs which may be awarded to him and the damages he may sustain by reason of the attachment. Code, § 230. It is the intention of the law that the defendant shall have that indemnity where his property is attached; and if the undertaking given, when the attachment is obtained, is insufficient for that purpose, the law cannot be properly administered without requiring an adequate increase in the amount to be made. The power is incidental to all the provisional remedies provided by the Code, and its existence is in substance provided for in the authority which the court has for supplying omissions in any proceeding; it is declared by section 174 of the Code, and it is sanctioned by the ruling made in the case of *Rowles v. Hoare*, 61 Barb. 266.

The power over undertakings given in applications for provisional remedies is entirely different from that relating to undertakings given on appeal; for there the amount is, in all cases, either fixed by the express terms of the statute, or it is required to be determined upon a hearing on facts indicating what the amount should be. Besides, the authority given the courts over provisional remedies does not apply to proceedings taken for the purposes of appealing.

For these reasons, and those stated by Justice Barrett in his opinion at the special term, the order should be affirmed, with \$10 costs, and the disbursements on the present appeal.

DAVIS, P. J., and DONOHUE, J., concurred.

*Order affirmed.*

## SAVAGE, appellant, v. ALLEN.

*Costs — additional allowance.*

Where a party, by the final judgment, does not recover general costs, but costs of the appeals only, he is not entitled to an additional allowance.

APPEAL from an order granting to defendant an extra allowance of five per cent on \$8,000, the value of the lot involved in the controversy. The action was brought by the appellant to restrain the respondent from prosecuting an ejectment suit, and for a confirmatory deed of the lot in dispute. The material facts appear in the opinion.

*W. Howard Wait*, for appellant. The right to an extra allowance where it exists is an incident to the right to costs. *Littlefield v. Murin*, 4 How. 308; *Belding v. Conklin*, id. 196; Code, § 308. The respondent has waived her right to an extra allowance by the judgment entered on direction of the general term. *Clark v. City of Rochester*, 29 How. 97; *Beals v. Benjamin*, id. 101; *People v. New York Cent. R. R. Co.*, 30 id. 148.

*Arnoux, Ritch & Woodford*, for respondent. The defendant has been put to needless and vexatious litigation, and no legal principle has been violated in granting the allowance. 8 N. Y. 107; 12 id. 336; 16 id. 543; 17 id. 28; 22 id. 420; 36 id. 395; 49 id. 286; also cited *People v. N. Y. C. R. R.*, 29 id. 418.

PER CURIAM. This case, being a suit in equity, was tried before a referee, who gave judgment in favor of the plaintiff, but held that the respective equities were such that neither party was entitled to recover costs as against the other. Judgment having been entered on the decision, the defendant appealed to the general term, where the judgment was reversed, with costs, to abide the event. From the judgment of reversal plaintiff appealed to the court of appeals, where the judgment of the general term was affirmed, with costs, and final judgment rendered for the defendant under the plaintiff's stipulation. Costs of the two appeals have been taxed, and the special term, on motion of the defendant, gave an additional allowance of \$400. Judgment has been entered for the costs of the appeals and the allowance, but not for costs of the trial.



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It is insisted that the case was not one in which the additional allowance could be given, on the ground that the defendant does not recover general costs, but costs of the appeals only. This position seems to be well taken. *Clark v. City of Rochester*, 29 How. 97; *Beale v. Benjamin*, id. 101; *People v. Central R. R. Co.*, 30 id. 148; *Van Rensselaer v. Kidd*, 5 How. 242; *Martin v. McCormick*, 2 Sandf. 755; *Quade v. N. Y. and E. R. R.*, 11 How. 434; 17 id. 456; *Wolf v. Van Nostrand*, 2 N. Y. 570.

The order granting the additional allowance must be reversed but without costs of the appeal.

*Order reversed.*

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PEOPLE *ex rel.* SPLAIN V. NEW YORK JUVENILE ASYLUM.

*Apprenticeship—N. Y. Juvenile Asylum—indenture to person out of State—Constitutional law.*

An indenture of a minor to service in a trade or employment for the period of his minority, executed by the New York Juvenile Asylum to a resident of Illinois, with the written consent of the minor's mother, after a previous surrender by her of the child to the custody and control of the asylum for and during his minority, constitutes a legal contract for binding the child to an employment, where it appears that such indenture contains all the covenants for the minor's benefit required by the laws of Illinois, and conforms to the laws of this State.

The act (Laws 1851, ch. 382), incorporating the New York Juvenile Asylum, and the acts amending the same (Laws 1854, ch. 387; 1866, ch. 245), by which power is given to the asylum to bind out or indenture the children committed to its charge as apprentices, etc., to some profession, trade or employment, in any State of the Union recognizing the validity of such indentures, are valid and constitutional.

CERTIORARI to review a decision of Mr. Justice DAVIS dismissing a writ of *habeas corpus*, issued December 9, 1872, requiring the respondent to produce in court the body of Michael Joseph Splain, a minor, the son of the relator.

The return, which is sustained by the evidence, shows that Michael Joseph Splain was not, at the time of the service of the writ, in the custody or under the control of the respondent, but was in the custody and under the control of one George W. Zimmerman, of Spar-

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land, Marshall county, Illinois, to whom said child had been indentured five years before.

The surrender of the child by the mother (who was a widow) to the respondent was made in the form required by law.

The New York Juvenile Asylum was incorporated under an act entitled, "An act to incorporate the New York Juvenile Asylum," passed June 30, 1851 (chap. 332). By said act, as amended by chapter 387, Laws of 1854, and further amended by chapter 245, Laws of 1866, it is provided that the corporation may receive under its care and management children between the ages of seven and fourteen years belonging to certain classes therein described. Among such classes are children who, by the consent, in writing, of their parents and guardians, are voluntarily surrendered and intrusted to it. Such children are to be deemed to be in the lawful charge and custody of the corporation. It is given power, in its discretion, to bind out or indenture, as clerks or apprentices, in this State, and also in any State of the United States which shall, by its laws, recognize the validity of such indentures, to some profession, trade or employment, the children intrusted or committed to its charge, and for a shorter or longer period, not exceeding the age of twenty-one years for males, and eighteen years for females.

The State of Illinois, in February, 1861, passed an act recognizing the validity of indentures by the said corporation to citizens of that State.

*M. J. A. McCaffery*, for relator. The surrender gives no authority to respondent, except temporarily, to retain the child, subject to the parent's right. If the respondent's charter gives it the right to send children out of the State, it is unconstitutional. *Groff's Case*, N. Y. C. P., 1865 (unreported).

*Charles D. Adams*, for the respondent.

DANIELS, J. The writ of certiorari issued in this case was designed to review a proceeding on *habeas corpus*, which was heard and decided before the court held at chambers. It should for that reason have been addressed to the court, instead of the justice presiding and holding it. But as a return has been made, the irregularity in this respect will not render it improper to dispose of the case upon its merits.

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The writ of *habeas corpus* was issued for the purpose of having the relator's son, Michael Joseph Splain, brought before the court in order that it might be determined whether or not he was unlawfully detained from her custody and control. Upon its return the body of the child was not produced before the court, and the omission was attempted to be excused by the statement, in the return, that he had been removed to the State of Illinois, where he had been indentured for the period of his minority, and where he then was, when the return was made. The evidence taken on the traverse of the return showed that the child, at the age of about nine years, was surrendered by the relator to the respondent's custody and control, for and during the period of his minority, with the same powers as she herself possessed. At the time of such surrender, which was made by her in writing on the seventh of February, 1867, the child was under the sole control of the relator. He afterwards remained in the custody of the respondent until the 23d of September, 1867, when he was indentured by it to George W. Zimmerman of Sparland, in the State of Illinois, for the period of eleven and three-twelfth years. At the time of his departure from the State, the relator consented to his removal. But she says her assent was given on the understanding, that he was to be taken only a short distance into the country, where he was to be detained until she was able to secure a home for him. This statement is not entirely credible, because it is contradicted by the entry in the books of the respondent's institution, showing that her assent was given to his removal to the place where he now is; and it is inconsistent with the previously unqualified surrender, which she made of her child's custody to the respondent. The court could very well conclude that the relator assented to her son's removal to reside there for the period of his minority, as the books of the institution showed that she did. And it may now be presumed to have done so, in support of the decision made on the hearing and determination of the traverse. The respondent was authorized to accept the custody of the relator's child upon the written surrender executed by her (Laws of 1866, chap. 245, § 7); and afterwards to bind him out in any State in the United States, whose laws recognized the validity of the indenture made by the respondent, to some profession, trade or employment, until he attained the age of 21 years (*id.*, § 18). As the State of Illinois, by act passed before the execution of the indentures made for the relator's son, did recognize the validity

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of such indentures, provided they contained certain covenants for the benefit of the minor required by the laws of that State, and the indentures made contained all such covenants as could be reasonably suggested or required, the indentures made for the relator's child must constitute a legal contract for binding him to an employment within the terms of both statutes, particularly as it was not suggested that any covenant, which the laws of Illinois required for the minor's benefit, had been omitted from the indentures.

It was claimed on the argument that the child had been bound beyond the period of his minority, and that the indentures were unlawful for that reason. This position was taken on the relator's own evidence, in which she stated his age to be about one month more than the age mentioned in the surrender signed by her. That stated him to be about nine on the 22d of January, 1867. These statements are entirely inconsistent; and, as the one contained in the written surrender of her son's custody was made when no motive existed for misrepresentation, that was more likely to be true than her evidence given for the purpose of re-asserting her control over his custody. Besides that, the respondent was required to ascertain the true age of the child, as far as that could be practically done, and to enter it in the books of the institution. That appears to have been done. And the statute provided that the age so ascertained should be deemed the true age of the child. Laws of 1866, chap. 245, § 18. For both these reasons, this position cannot be allowed to prevail. Upon neither ground does it appear that the child was bound to service beyond the period of his minority.

The power exercised by the respondent seems to have been used in strict conformity to the terms of the law, and no reason appears for doubting the validity of such legislation. It is essential to the good order and protection of the community, and constitutes a part of the general police power of the State. That power cannot be more humanely and usefully exercised than it is by making salutary and wise provisions for the education, improvement, comfort and security of the destitute, homeless and needy children found in the large cities of the State. Both their own usefulness and prosperity, and the interests of the public, are greatly promoted by its judicious and discriminating use. No case could illustrate the wisdom and propriety of such legislation more completely than the present. Under its provisions the child of the relator, whom she proved unable to care for and maintain, was by her voluntarily surrendered to the custody of a

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charitable institution, by whose interposition he has found a friendly and hospitable home, in which his education has been provided for and his wants completely supplied. The interests of the child himself, as well as those of his mother, will undoubtedly be best subserved by leaving him during the residue of his minority among the new friends, who, the evidence shows, have become interested in his welfare. There seems to be no ground on which the validity of the indentures can be properly questioned. Besides that, the respondent has no control over his custody. That was parted with, in apparent good faith, in the mode prescribed by law, and no authority seems to exist for annulling the indentures by which the relator's child has become bound. The decision made by the court, upon the return of the *habeas corpus*, was right, and it should be affirmed.

DONOHUE, J., concurred in the result.

*Proceedings affirmed.*

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RICHARDS, appellant, v. JUDD *et al.*

*Libel — examination of party as a witness — refusal to answer — striking out complaint.*

In an action for libel, the complaint alleged that the plaintiff was the proprietor and manufacturer of certain articles of medicine known as "Dr. Richau's Golden Remedies," of which the sales and profits were large; that the defendants had, in a magazine published by them, characterized his Golden Remedies as "nonsensical quackery," etc., and as valueless, and possessing no medicinal qualifications whatever. The defendants, in their answer, alleged that the publication was substantially true, and made with good motives, and for justifiable ends. The plaintiff, being examined by the defendants as a witness on their behalf, under an order of the court, was directed by the judge to state of what ingredients certain of his remedies were composed. He refused to answer, otherwise than by saying it was "a secret compound of various ingredients of great medicinal properties." *Held* that the answer was evasive, and that the court properly ordered the complaint to be stricken out and dismissed with costs.

APPEAL from an order of the special term, striking out the complaint and dismissing the same with costs, for the plaintiff's refusal to answer certain questions propounded to him as a witness pursuant to the order of the court. The facts are sufficiently stated in the opinion.

*John S. Walker*, for appellant. The questions were not involved in this issue and were immaterial. *March v. Davison*, 9 Paige, 580; *Swift v. Dickinson*, 31 Conn. 285; also cites *Ansen v. Tuska*, 19 Abb. 391; 4 Hurlst. & Norm. 146.

*Amos G. Hull*, for respondent, cites *Byrn v. Judd*, 11 Abb. N. S. 390; *Fetridge v. Wells*, 13 How. 396; 8 Simons, 479; 6 Beavan, 66; 13 id. 213; 11 N. Y. 347; 11 Abb. 157; 19 How. 530; 10 Pick. 9.

DAVIS, P. J. The plaintiff alleges in his complaint, in substance, that he is, and has for many years been, the sole proprietor, owner and manufacturer of articles of medicine and merchandise, generally and publicly known as Dr. Richau's Golden Remedies, which he has for ten years last past manufactured and put up, and offered for sale and sold; and that, by means of extensive advertising and the good qualities, etc., of such Golden Remedies, he has secured large sales and profits. He also alleges that the defendants are publishers of a monthly magazine, known as the *Amerian Agriculturist*, and having a circulation, monthly, of two hundred and fifty thousand copies; that in November, 1872, the defendants published in their said magazine a certain libelous article in the following words:

"SUNDRY HUMBUGS.—Our newer readers keep inquiring about the trustworthiness of this, that and the other doctor for various diseases. We answer that every so-called physician, every medical institute, or college, or association, that advertises medicine or medical advice, by circular or otherwise, is a quack, in short, a swindle. The whole tribe of those who advertise 'marriage guides,' 'female medicines,' 'advice to the young,' 'errors of youth,' 'eye doctors,' 'ear doctors,' 'consumption curers,' 'cancer doctors or medicines,' etc., etc., are positively quacks and impostors, to whom it is unsafe to address even a letter of inquiry; also, the 'Golden Remedies,' inquired about by several, are nonsensical quackery.

"We have not room for a lot more of humbugs on hand, but will renew the war upon them in the next volume, and, as hitherto, we expect to shield at least all our readers from swindlers and through them many other people."

The plaintiff alleged, also, "that the defendants by means of these words, published as hereinbefore set forth, insinuated and meant to be understood by those to whom it was published, and to the public at large, as charging the plaintiff with being a quack, impostor and

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swindler, and that the said 'Golden Remedies,' manufactured solely by the plaintiff, were wholly valueless and useless, and possessing no medicinal qualifications whatever," and that by means of the publication the plaintiff has been injured in his reputation and in his business, and been deprived of custom and trade, and lost the sale of goods and profits which he would otherwise have made, etc., to his damage of \$25,000.

The defendants in their answer, admit, in substance, that they are publishers of the *American Agriculturist*, and that in December, 1872, they published the article, under the caption of "Sundry Humbugs," above set forth. They allege, also, that the publication is substantially true, and was published with good motives and for justifiable ends. They also set out, *in extenso*, the circulars sent forth by the plaintiff with his "Golden Remedies," in which the plaintiff describes himself as a physician who has had a general practice in all parts of the world; and aver various facts tending to show that the alleged medicines of plaintiff are valueless as remedies for disease, being compounds costing but a few cents per bottle, and selling at several dollars, which the public would shun if the constituent parts were known. The defendants propose in their answer to give evidence of all the various facts alleged, both in justification and in mitigation of damages.

Issue being joined, the defendants, upon affidavit, procured an order and summons for the examination of plaintiff as a witness on their behalf before the trial. On such examination the plaintiff testified that a bottle marked, "Dr. Richau's Golden Balsam, No. 2," was one of the medicines he advertises and vends to the public. He was then asked of what Balsam No. 2 was composed. He refused to answer the question on the ground that it was irrelevant, immaterial, and a secret in his trade. The judge directed the plaintiff to answer the question. He then answered, "It is a secret compound composed of various ingredients which possess great medicinal properties," and refused to state the names of the ingredients. He then gave evidence showing that he was not a doctor of medicine and had never received a diploma, and had not been engaged in a general practice of medicine in any part of the United States.

He then testified that he advertised "Dr. Richau's Golden Elixir de Amour, or Elixir of Love," and on being asked "Of what is it composed?" he refused to answer.

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The court at special term, after argument, ruled that the plaintiff must answer the question which had been propounded, and, on the question being repeated to him, he answered: "It is a secret compound of various ingredients, which possess great medicinal properties;" and refused, absolutely, to give any other answer.

On presentation of these facts to the court, it was held that the answer was evasive; and the plaintiff, under the advice of his counsel, refusing to give any other answer, the court ordered his complaint to be stricken out, and dismissed with costs.

By the allegations of his complaint, the plaintiff had invited an issue as to the medicinal qualities and value of his golden remedies. The statement of the alleged libel, so far as it pointed directly to plaintiff or his remedies, was to the effect that his golden remedies are "nonsensical quackery," and it is chiefly of this statement that the plaintiff complains. The defendants undertake, by their answer, to show that this statement is true.

No one can read the circulars of plaintiff, as proved by himself on his examination, without observing the importance of the investigation sought to be made. It was competent to disprove the assertions of the circulars, and of the complaint, by ascertaining the ingredients of the several compounds, for the purpose of showing that they possess no such medicinal virtues as are claimed by plaintiff.

For instance, he asserts in his circular that his Elixir of Love 'is composed of the most powerful ingredients of the vegetable kingdom, harmless, but speedy in restoring healthy action.' And again: "It is the fountain of youth to old age — the rejuvenator of pristine vigor in the young; to the barren women of our land it is a special blessing." Indeed, it is impossible to read the vulgar, and in many respects shameful, assertions and instructions that accompany the compounds of plaintiff, without being struck with the vileness of his impostures.

That he can bring an action of libel, for injury alleged to be done to his trade in his medicines by denouncing them as arrant quackery, and at the same time protect himself against exposure by claiming them to be valuable secrets, is a proposition that cannot be maintained. *Byrn v. Judd*, 11 Abb. N. S. 390; 11 N. Y. 347.

In the laudable exposure of such "humbugs" as the pretended medicines of plaintiff and others, the defendants take upon themselves great risks, and subject themselves to the annoyance of suits:



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but I think they are not exposed to any danger that courts will interpose any shield for the protection of parties guilty of fraud and deception of the public.

If the plaintiff did not choose to try the question of the true character of his "Golden Remedies," he should have kept out of a court of justice. The order of the court below was correct, and should be affirmed, with \$10 costs and disbursements.

DANIELS and DONOHUE, JJ., concurred.

*Order affirmed.*

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BANKS v. BANKS, appellant, *et al.*

*Partition — sale in — dower — Supreme Court rule 85.*

The amount payable to a doweress, in lieu of dower, from the proceeds of a sale in partition, is regulated by the Revised Statutes, and not by rule 85 of the supreme court.

APPEAL from an order of the special term directing the amount payable to the appellant in lieu of dower from the proceeds of certain real estate in this action, which is one in partition. The common ancestor, David Banks (father of the plaintiff), died at New York city, September 8, 1871; a son of his, Francis S. Banks (the husband of the appellant), died January 27, 1872, seized of an undivided fourth of the estate of his father, in which fourth this defendant has a right of dower, as established by the judgment in this action, and the two children of Francis S. Banks and this defendant, the defendants Harriet Augusta Banks and David Banks (third) are the only other parties, besides this defendant, who are interested in the remainder of said undivided fourth.

These two children herein appear by their guardian *ad litem*.

The property sold was situated in New York city, and the net proceeds, ready for division, amount to \$673,387.18, one-fourth of which is \$168,346.79, and in this latter sum the appellant has a right of dower, for which she is directed, by said judgment, to be paid a sum in gross in lieu thereof. This sum in gross, calculated upon the principles of life annuities, and according to the rule of court

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applicable thereto, as it stood before being amended (which amendment went into force February 1, 1871), amounts to \$37,830.88; but if this sum is to be calculated as restricted by the said amendment to the rules (see 85th rule), viz., "but such allowances shall in no case exceed one-half of such principal sum," then it will amount to \$28,057.79.

And the question now presented is, which of these sums shall be paid to this defendant for her right of dower, and involves a decision of the question, whether the latter part of the 85th rule of this court is properly applicable in this case.

The special term fixed the amount payable to appellant, according to the 85th rule, at one-half the principal sum.

*E. Ellery Anderson* and *Thomas B. Odell*, for appellant. Defendant's right is fixed by the Revised Statutes, and not by the rule of court. 3 R. S. (5th ed.) 613, §§ 61, 62, 63; Laws 1870, ch. 717, § 5; 7 Paige, 408; *Mathews v. Duryea*, 17 Abb. 257; 4 Keyes, 525. The rules are rules of *practice* solely, and do not establish or take away rights of property.

Laws 1870, ch. 408. The portion of the 85th rule in question is inconsistent with the Revised Statutes.

*George W. Parsons*, guardian *ad litem*, in person.

DANIELS, J. The proceeds of the sale, from which the defendant appealing is entitled to her dower, were produced by the partition of real estate, sold under a judgment of this court, and by the statute applicable to the case she is entitled to such a sum in gross out of the amount as shall be deemed, upon the principles of law applicable to annuities, a reasonable satisfaction for her estate as doweress in the lands sold. 3 R. S. (5th ed.) 613, § 61.

This statute declares the right and prescribes the rule for its determination in very plain and direct terms. It does not confer discretionary authority upon the courts, which may be enforced or withheld as their views of what may be proper would suggest, but the rule is one of general application, controlling alike all cases comprehended within its terms. The same proportionate compensation that may be due in one case is provided for all others, and that is such a sum in gross as shall be deemed a reasonable satisfaction of the estate, calculated upon the principles of law applicable to life annuities. The sum awarded to be calculated on those princi-

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ples which have for many years been applied and administered by courts of equity. Whatever the sum may be which that mode of calculation will produce, that is the amount the widow will be entitled to receive as the gross value of her estate.

The statute creates an absolute right to such an amount, rendering it subject to no contingency whatsoever. It is as fixed and definite as language can reasonably define it, and no limitation or restriction can be imposed upon it without modifying this statutory right to a corresponding degree. To do that requires the exercise of legislative authority different from that conferred upon the courts for the purpose of ordaining and promulgating rules of practice. If one qualification can be by rule imposed upon this statutory right, others may follow it, and in that way the right itself may be so far impaired as to be divested of its chief value. The fact that the person for whose benefit it was created may accept it or not, as she chooses, can make no difference, for the legislature have provided exactly what she shall receive in case she makes the election to take it.

The 85th rule of this court, so far as it diminishes the amount to be received below that provided for by the statute, is in conflict with this legislative provision, and where such a conflict is found to exist, there the rule itself must yield, for the power to make rules is not an authority for the adoption of any which may be attended with the effect of divesting statutory rights of property. Over subjects of that description the power to prescribe rules cannot, with any propriety, be allowed to extend.

The order appealed from should be so far modified as to award to the appealing defendant the gross value of her dower as it is secured by the statute, the same as though the 85th rule had never been declared applicable to the subject.

DAVIS, P. J., and DONOHUE, J., concurred.

*Order modified accordingly.*

MITCHELL v. BUNN, survivor, etc., appellant.

*Pleading — amendment of — power of court to allow.*

Where the propriety of setting up a counter-claim first appeared upon a trial before a referee; *held*, that the defendant might, after the trial was suspended by an order staying proceedings, apply to the special term, on motion, and obtain an order permitting him to amend his answer by setting up that defense.

APPEAL from an order denying leave to amend answer. The action being on trial before a referee, the defendant obtained an order staying proceedings, and to show cause why he should not have leave to amend his answer by setting up a counter-claim. The motion was heard before Mr. Justice INGRAHAM, who denied the motion, and indorsed as his opinion on the papers: "The proposed amendment of the answer cannot be made without making a new issue, and then rendering all proceedings on the reference void. Nor is it proper, after commencing the trial, to amend an answer by adding a new defense. 13 Abb. 207; 18 How. Pr. 506, Code, § 173." From this order, denying leave so to amend, this appeal is taken. The other material facts appear in the opinion.

*Ten Broeck & Van Orden*, for appellants. Leave was denied on the ground of want of power, and an appeal lies. 34 Barb. 553; 20 N. Y. 81; 12 Abb. Pr. 16; 3 Wend. 366. The order affects a substantial right. 22 Barb. 164. A motion may be made at special term, and trial suspended. 53 Barb. 525. Also cited 20 N. Y. 81; 14 East, 395; 50 Barb. 110.

*Edwards & Odell*, for respondents. The motion was not denied for want of power. *Ford v. Ford*, 53 Barb. 525. It was discretionary and not appealable. 13 Abb. 268; 19 How. 233; 23 N. Y. 357; 19 id. 439; 38 id. 206. The amendment sought constituted an entirely new cause of action or defense, and it was not proper on the trial to grant it. *Ford v. Ford*, 53 Barb. 530; 39 id. 104.

DANIELS, J. It appears, by the papers before the court, that the propriety of setting up the counter-claim first appeared during the taking of the evidence on the trial before the referee. The defendant thereupon, without unreasonable delay, applied for leave to

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amend his answer by alleging that defense; and the court seems to have denied the motion on the ground of want of power to permit the amendment after the trial had commenced. Such a restriction does exist on the power of the tribunal before which the trial is progressing. For that reason the referee could allow no such amendment. Neither could the circuit before which an action was upon trial. Before those tribunals the power of amendment is limited by the Code to simple matters of variance.

But when the trial is suspended, and the party applies to the special term upon motion, a very different rule is applicable. Then, by the express provisions of the Code, the court may allow a pleading to be amended by inserting other allegations material to the case, and, by means of a supplemental complaint, answer or reply, allow facts material to the case to be alleged, occurring after the former complaint, answer or reply, or of which the party was ignorant when his former pleading was made. Code, §§ 173-177. This latter provision, by its express terms, includes a case like the present one. It is a general unrestricted authority, not required to be exercised at any particular period, or in any designated condition of the action. But the courts are left at full liberty to use and apply it in all stages of the proceedings, as right and justice may appear to require. There is nothing in the fact that a trial has been commenced which should induce the refusal to make use of this authority for the purpose of amending the pleadings, even though a new issue may be formed, when justice requires that to be done.

Nothing is contained in the cases cited holding that such a change cannot be made on special motion. They simply deny the power of the tribunal before which the trial may be at the time proceeding to allow such amendments of the pleadings (*Bank v. Mott*, 18 How. 506; *Bigelow v. Dunn*, 53 Barb. 570); while on special motion made for that purpose, amendments have been allowed permitting new causes of action and new defenses to be set forth in the pleadings (*Ford v. Ford*, 53 Barb. 525; *Cocks v. Radford*, 13 Abb. 207), and the amendment may be allowed in that manner after the action has been referred. *Beardsley v. Stover*, 7 How. 294. There is nothing in the nature of the proceeding after a trial has been commenced inconsistent with the exercise of this power, in a proper case, during its progress. Of course, a very strong case should be required, free from all laches on the part of the moving party, to justify such interference during the progress of the trial;

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but when that is shown, and justice appears to require it, the amendment should be allowed to be made on such terms as will constitute a fair indemnity to the adverse party. The existence of such a power is indispensable to the proper administration of justice, and it has not been uncommon to exercise it when the emergency appeared to justify it.

The order should be reversed and an order entered allowing the counter-claim to be set forth by means of a supplemental answer on condition that the same be served within ten days after notice of the order to be entered, and that the defendant pay the plaintiff a trial fee for the trial already commenced, and \$10 costs of opposing this motion, and stipulating that the evidence already taken shall be applicable to the case as it may be changed by the allegations of the counter-claim. In case of a failure to comply with these terms within such time, then the motion will be denied, with \$10 costs of this appeal, besides the disbursements made therein.

DAVIS, P. J., and DONOHUE, J., concurred.

*Ordered accordingly.*

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## PETITION OF ASTOR, trustee, etc., appellant.

*New York city—paving of streets—Laws 1872, ch. 580, § 7—assessments—publication—former paving at owners' expense..*

Where a street in the city of New York has once been paved, at the expense of the owners of the lots, by consent of the common council, the case is not within the exception contained in Laws 1872, chap. 580, § 7, which provides that assessments shall not be set aside or vacated on the ground of any irregularity in the publication of the ordinance, except where fraud shall be shown, and in cases of assessments for the repairing of any street, etc., upon property for which an assessment has once been paid for paving the same street, etc.

Accordingly *held*, that a prior paving of a street at the expense of the property owners, without any assessment, was no bar to the vacation of a subsequent assessment for paving, on the ground that the ordinance directing the improvement had not been published for two days before its adoption by the common council.

THIS is an appeal from an order denying a motion to vacate an assessment upon petitioner's lots, for the paving of a street

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adjacent to the petitioner's property, upon the ground that the ordinance directing the improvement had not been published for two days prior to its adoption by the common council, in all the newspapers employed by the corporation; also, that the said street had been paved in the year 1860, by the petitioner, at his own expense and by permission of the common council. No assessment for paving, prior to the one now in question, had ever been laid upon the petitioner's lots.

*Develin, Miller & Trull*, for appellant. The petitioner is within the spirit of the exception of act of 1872; chap. 580, § 7. 5 Johns. 380; 4 N. Y. 140; (*People ex rel. Bolton v. Albertson, Comptroller of Troy*) (court of appeals, Nov., 1873), 17 Vt. 479. The common council having authorized the petitioner to pave the street at his own expense, it is in effect an assessment.

*E. Delafield Smith*, counsel to the corporation for the city, cited *In re Mayor*, 50 N. Y. 504. The statute excepts only those cases of assessment in which an assessment has once before been paid.

DAVIS, P. J. The irregularity relied upon to vacate the assessment in this case is the failure to publish the ordinance of the common council authorizing the work, as required by section 7, chapter 446 of the laws of 1857.

This would have been a fatal objection within *Matter of Douglass*, 46 N. Y. 42, but for the act of 1872. Laws of 1872, chap. 580; *Matter of Mayer*, 50 N. Y. 504. The point relied upon is, that this case is one of those excepted from the curative effect of that act by the excepting clause contained in the seventh section.

The seventh section provides that assessments shall not be set aside or vacated on the ground of such non-publication of the ordinance, "except only in cases in which fraud shall be shown, and in cases for the repaving any street, avenue or public place, upon property for which an assessment has once been paid for paving the same street or public place."

The petitioner proved that the street had once been paved at his own expense, by consent of the common council, under the direction of the Croton aqueduct department, who approved of and accepted the work. The ordinance of the common council, under which the former paving was done, was a mere permission or privilege granted

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to the owners of the property on Fifty-fifth street to pave at their own expense, for their own accomodation, subjecting the work, however, to the direction of the Croton aqueduct department, doubtless because it was supposed it might to some extent interfere with the mains or water-pipes of that department. It was in no sense a proceeding *in invitum*, and it involved in no form the exercise of any authority to assess any property for the expenses of the pavement. The language of the exception seems to be very plain, and to leave neither room nor occasion for extending it by construction. The statute is remedial, and intended to relieve from consequences very onerous to the city and productive of general public injury. The exception should, therefore, have no construction that will extend beyond its plain terms. It takes out of the relief the cases specified and no others. One class of them is cases of assessments for repaving any street upon property for which *an assessment has once been paid* for paving the same street. The imposition of a former assessment, which the party or his property was bound by law to pay, so that in a legal sense he or his property may be said to have been compelled to contribute to the public benefit, is the sole subject of contemplation by the statute, and not cases where parties have been permitted to improve their own property, for their own benefit, by paving a street in front of it.

The argument of the learned counsel for the appellant, though extremely ingenious, fails to satisfy our minds that the statute was intended to embrace every case of a prior paving of a street at the expense of the owners of the land through which it was laid. Had that been the intention, it would have been expressed. It would have been very easy to have said "upon property which has once paid for paving the same street," instead of "*for which an assessment has once been paid.*" We see no requirement of justice that calls on us to extend or enlarge the statute for the relief of the petitioner, and no such humanitarian necessity as will justify it.

The order appealed from should be affirmed.

DANIELS and DONOHUE, JJ., concurred.

*Order affirmed.*



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Von Rhade v. Von Rhade.

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## VON RHADE v. VON RHADE.

*Pleading — action for divorce — complaint — affidavit and order for publication — service by mail — default — judgment.*

A complaint, in an action for divorce, alleged that the plaintiff was an inhabitant of this State, and had been so from the 10th of September, 1872, and then charged the defendant with acts of adultery committed between the 1st of January, 1870 and 1873. *Held*, that the averment was sufficient to constitute a proper cause of action for the consideration and action of the court, under the act of 1862 (Laws of 1862, ch. 248, § 1), and that conferred jurisdiction over the subject-matter of the action.

An affidavit for obtaining an order for publication, which states that the defendant cannot be found within the State, although due search has been made for him, and that he is a resident of Berlin, Prussia, fails to comply with the requirements of the Code (§ 185) if it does not show what efforts have been made to find the defendant. But the defect will not deprive the justice of the power to make the order.

An order for publication directed that the summons in the action should be published, and the copy summons, recited in the published order as being annexed, was not the summons which the order required to be published, but one requiring the defendant to appear and answer in six instead of twenty days. *Held*, that the fact that the order recited that a copy of the summons was annexed, when in fact it was not, in no manner qualified the direction or rendered it invalid.

An order for service by mail required copies of the summons and complaint to be directed to the defendant at his place of residence, "Berlin, Germany." The direction was to him at the "Union Club, Berlin." *Held*, that, as the affidavit stated that this was his place of residence, it showed a substantial compliance with the order.

Jurisdiction of the person of a defendant having been acquired, it is not lost by the premature entry of his default, and a reference of the action for the purpose of taking the proofs.

Where the plaintiff in a divorce suit had, on the faith of the judgment therein, married an innocent third person: *Held*, that the judgment should be allowed to stand for their protection, until it should appear that the plaintiff had no right to the relief it had provided for her.

**APPEAL** from an order denying motion to set aside judgment in an action brought for a divorce.

On the 10th March, 1873, the plaintiff exhibited her complaint for a divorce *a vinculo*, alleging that she was married to the defendant in 1865, at Berlin, in Prussia; that since September 10th, 1872, she has been an actual inhabitant of this State; and charging the

defendant with having at a certain house in Berlin, at divers times, since January 1, 1870, committed adultery with a certain person therein named. The complaint was filed March 12, 1873.

On the 11th March, 1873, upon an affidavit of the plaintiff that the defendant cannot, after due search, be found within this State, "and is in fact a resident of Berlin, in the Empire of Germany, where he now actually resides," an order was made "that the summons herein, a copy whereof is hereunto annexed, be served by publication, and that a copy of the summons and complaint be forthwith deposited in the post-office, directed to said defendant, at his said place of residence." The summons thus annexed to the order of publication requires the defendant to answer within *six days*.

The first publication of the summons was made on the 13th of March, and required the defendant to answer within *twenty days*. A copy of the summons and complaint was deposited in the post-office on the 13th of March, 1873, directed to "Adolph von Rhade, Union Club, Berlin, Prussia."

According to the summons, *as published*, the time to answer did not expire till after the 14th of May, 1873. The affidavit of no answer was made on the 13th of May, and on the 14th an order of reference was made, reciting service of the summons and complaint, by publication, more than twenty days before, and that no notice of appearance, answer or demurrer had been put in.

The only evidence tending to show adultery on the part of the defendant related to alleged acts of his committed on the 22d, 23d and 29th March, subsequent to the exhibiting and filing the complaint.

Judgment of divorce was rendered, on the report of the referee, on June 2, 1873.

Upon the record, an affidavit of Mr. Burke, and the petition of the defendant made and verified at Berlin, 12th July, 1873, stating that he "had never received any notice whatever of a bill for divorce having been filed against him;" the defendant, on the 12th August, 1873, appearing by attorney, "for the purpose of this motion only," moved the court, at special term, to vacate the judgment as void, for want of jurisdiction, or else for an order to open the judgment, and allow the defendant to answer and defend.

On the 17th of October, there was made an order to show cause why the plaintiff should not be allowed to annex to the judgment roll a

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certain summons, which, it appeared, was one of three prepared by the plaintiff's attorney, on the 12th March, 1873, for publication and mailing. This order was served on the attorney, who had only specially appeared for the motion to vacate the judgment, and was returned to the plaintiff's attorney on that ground.

On the 19th of November, 1873, an order was entered, allowing the plaintiff to amend the judgment roll, by annexing the said summons thereto; also that the order of reference of May 14th, be entered *nunc pro tunc*, as of May 15, 1873; also denying motion to vacate the judgment, but allowing the defendant to come in and defend on terms.

From this order both parties appealed; the defendant from the whole and every part thereof, and the plaintiff from so much as allows the defendant to make a defense to this action.

*Theodore Aute*, for plaintiff. As the judgment was not held void, the defendant should not have been allowed to defend. Under the Code (§ 135), if a judgment of divorce against a non-resident be regularly obtained, there is no power to open it as a matter of favor. The court had a right to receive the evidence of acts committed after the commencement of the action, as evidence of a continuing illegal cohabitation, running back so as to cover the time alleged in the complaint. 2 Greenl. Ev., § 57; 20 Ala. (N. S.) 65; 13 id. 172; 101 Mass. 111; 30 L. S. (N. S.) 12 How. 945; 1 Edm. Sel. Cas. 107; 20 N. J. Rep. (5 E. E. Green) 211; 35 N. Y. 215; 2 Hag. Sons. 223.

*Salomon & Burke*, for defendant. 1. The court should have vacated the judgment, because it had never obtained jurisdiction over the defendant. The judgment was void. *Hallett v. Righter*, 13 How. 43; *Cook v. Farmer*, 12 Abb. 359; *Wortman v. Wortman*, 17 id. 66. As to the address: Code, § 135; *Hyatt v. Wagenright*, 18 How. Pr. 248. 2. The judgment should have been set aside, because the order of reference was prematurely made. Code, §§ 135 and 425. *Brod v. Heymann*, 3 Abb. (N. S.) 396; *Richardson v. Bates*, 23 How. 516; *Brooklyn Trust Co. v. Bulmer*, 49 N. Y. 84. The court should have vacated the judgment, because there was no evidence to support it. Acts subsequent to the filing of the complaint could not have that effect. *Ferrier v. Ferrier*, 4 Edw. Oh. 296.

DANIELS, J. The motion, on the hearing of which the order appealed from was entered, was made upon the ground that the plaintiff's proceedings, taken for the purpose of commencing this action, were so defective as to render the judgment pronounced void for want of jurisdiction. By the complaint in the action, a case was presented which was within the jurisdiction of the court, as that was at the time regulated by statute. For it was alleged that the plaintiff was at the time of its presentment an inhabitant of this State, and had been so from the 10th of September, 1872, and then charged the defendant with acts of adultery committed between the 1st of January, 1870 and 1873. By the act of 1862, jurisdiction was conferred upon this court to decree a divorce on the ground of adultery, when the injured party at the time of the commission of the offense, and at the time of exhibiting the complaint, shall be an actual inhabitant of the State. Laws of 1862, chap. 246, § 1. The averment made was sufficient to constitute a proper cause of action for the consideration and action of this court, under this statute. And that conferred jurisdiction over the subject-matter of the action.

The affidavit on which the order was made for the publication of the summons stated that this complainant was here, and that the defendant could not be found within the State, although due search had been made for him ; and that the defendant was a resident of Berlin, in the Empire of Germany, where he then actually resided, to the knowledge of the plaintiff, who swore to it. This was sworn to on the 10th of March, 1873, and the order directing the publication of the summons was made on the following day. This affidavit was materially defective in its failure to conform to the requirements of the Code, providing that an order for the publication of the summons shall only be made when it shall be made to appear by affidavit, that the person on whom the service is to be made cannot, after due diligence, be found within the State. Code, § 135. It did not show what efforts had been made to find the defendant. That fact is required to be shown, because it does not follow that a non-resident may not, by diligent search, be still found within the State, and personal service made of the summons upon him. And where, by diligent effort, that may be done, the law does not allow service to be made by publication.

But the defect was not of so serious and important a nature as to deprive the justice who made the order of the power of making it.

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For, from the statement that the defendant was, at the time when the affidavit was made, actually residing in Berlin, he could infer that no diligence could result in the personal service upon him. At least the inference deduced from the statement of that fact would not be so entirely unsupported as to be without colorable evidence to sustain it. And where that is the fact, a case of simple error is shown and not an absence of jurisdiction. Where a court or officer has such a degree of evidence before him as fairly to require the exercise of judgment upon its weight and effect, an erroneous conclusion simply renders his act voidable but not void. That was the nature of the proof which was supplied by the plaintiff's affidavit, and it was sufficient to sustain the validity of the proceedings as long as no order has been made setting them aside. The rule upon this subject has been declared in the following terms: "When the proof has a legal tendency to make out a proper case, in all its parts, for issuing the process, then, although the proof may be slight and inconclusive, the process will be valid until it is set aside by a direct proceeding for that purpose. *Miller v. Brinkerhoff*, 4 Denio, 118, 120. *Staples v. Fairchild*, 3 N. Y. 41, 46.

But it is claimed that the order, in its direction, wholly failed to conform to the provisions prescribed upon that subject by the Code, inasmuch as the copy of the summons annexed to it required the defendant to appear and answer in six, instead of twenty days. That, however, was not the summons which the order required to be published. For the direction was, that the summons in the action should be published, and the fact that the order recited that a copy of it was annexed, when in fact it was not, in no manner qualified or rendered that direction invalid. The recital was manifestly erroneous, and as it was in no sense controlling upon the direction given for the publication, and was followed by publication of the summons in the action, no injury resulted from this informality.

The affidavit showing the mailing of a copy of the summons and complaint to the defendant, under the order, states that it was a copy of the summons and complaint in this action. And from that it may be inferred, that an accurate copy of the summons in the suit accompanied the copy complaint mailed.

This affidavit does not show a strict compliance with the order of publication in the address of the papers mailed. That required the copy to be directed to him at his said place of residence, referring,

of course, to the statement contained in the affidavit, showing that to be Berlin, in the Empire of Germany, while the direction actually given the package addressed it to the defendant at the Union Club, Berlin. But as that is followed by the general statement in the affidavit, that it was his place of residence, it did show a substantial compliance with the order. This statement is in no way inconsistent with the plaintiff's statement of the defendant's residence, in her affidavit, for if his residence was as the attorney's affidavit states it, then both affidavits are literally true. And it does not follow that he did not reside, at the time when the copy summons and complaint was mailed to him, at the Union Club, because, at a later period, his residence was in a different part of the city of Berlin. This defect, if it can be properly said to be one, in no way prejudiced the defendant, and for that reason it may be disregarded. Code, § 176.

The proceeding already mentioned resulted in such a commencement of the action as to confer jurisdiction upon the court, for the purposes of the action, over the person of the defendant. For the additional fact was shown that the summons in the action was properly published during the period specified in the order, and jurisdiction having been acquired, it was not lost by the premature entry of the defendant's default and the reference of the action for the purpose of taking the proofs. That was an inexcusable irregularity, indicating gross inattention to the condition of the proceedings, on the part of the plaintiff's attorney. But it did not divest the jurisdiction over the person of the defendant already acquired by the preceding proceedings. The rule upon this subject was stated by Justice INGRAHAM as follows: "In such a case any departures from the statutory provisions regulating proceedings before judgment are only irregularities, which may be waived by the parties, and which do not affect the validity of the judgment, if such judgment should finally be rendered according to law. Or, in other words, a want of jurisdiction can never be alleged as to the interlocutory proceedings in an action, where the court has obtained jurisdiction originally and renders the proper judgment in the cause." *D'Ivernois v. Leavitt*, 8 Abb. 59, 62; and the same principle in substance was affirmed in *Schaeltler v. Gardiner*, 7 N. Y. 404.

Although the default was entered, and the reference ordered, before the plaintiff was entitled to a direction for either, the reference itself did not proceed until the time arrived when the order could be law-

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fully executed. The object of the reference was to take the plaintiff's proof, on which an application could afterward be made for judgment in the action. It was taken for the purpose of enabling the court, not the referee, to pronounce judgment, and might have been taken by the court itself. Regularly, it could not be directed to be taken until it was seen whether a defense was to be made or not. But the omission to delay the direction until that time could not divest the jurisdiction which had already been acquired of the person of the defendant. The order directing the reference to proceed was irregular; but, when it did proceed, the defendant had made default, and the proof could be properly taken. But, assuming that it was irregularly taken, it did not invalidate the judgment afterward ordered upon it by the court, for the evidence was regularly submitted to the court, at a term held for such purposes, and it was of such a nature as to require judicial action upon it.

It is true that the evidence, as it was taken, was in itself defective, because it was not confined to the misconduct of the defendant alleged in the complaint, and it also failed to state the fact that the plaintiff was an actual inhabitant of the State when the complaint was established, and the offense proved was committed. To admit the proof of the misconduct established strictly required a supplemental complaint. Code, § 177. But the pleading and the proof together, presented the point for the consideration and decision of the court, and that, in effect, was held not to be necessary in the disposition which was made of the case. This was no doubt an error, but a mere error could not render the judgment affected by it invalid. It would still, as long as allowed to stand, have the force and effect of a judicial determination between the parties, and it could only be set aside by some direct proceeding involving the review of the error.

As to the fact of inhabitancy the case was not entirely unsustained, because the complaint and the affidavit on which the order of publication was made were both verified within this State by the plaintiff, on the 10th of March, 1873, and she appears to have also been in this State when the order of reference was executed. From these circumstances, the court could properly infer that she was an inhabitant of this State when the complaint was filed, and also through the month of March, 1873, when the defendant's misconduct was shown to have occurred.

The proceedings in the action abound in defects and irregularities.  
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ties, but they were none of them of so serious a character as to deprive the court of power to pronounce judgment. Ordinarily, they would require the court, in the exercise of its discretion, to set aside a judgment, for the purpose of leaving the defendant at full liberty, unaffected by its entry, to defend the action. But it is not essential to the security and protection of the defendant's rights in the action, that the relief afforded should be so far extended. He can fully defend himself if the plaintiff has no just cause of complaint against him, or if he has any lawful defense against her charges, by simply giving him unqualified leave to answer, and in the meanwhile allowing the judgment to remain undisturbed. That relief he clearly ought to have, under the circumstances, but as the plaintiff, on the faith of the judgment, has married an innocent third person, the judgment should be allowed to stand for their protection until it shall appear that the plaintiff has no right to the relief it has provided for her. The order appealed from should be accordingly so far modified as to allow the defendant the same liberty to answer as he had before the period for answer expired. And in order to give him the full benefit of this modification, as he resides in a foreign country, he should have forty days time, at least, to avail himself of this liberty. As so modified, the order should be affirmed, without costs to either party, and with liberty to either party to file and serve a supplemental complaint, or an answer, as the case may be, at any time within twenty days after notice of the order.

DAVIS, P. J., concurred. DONOHUE dissents.

*Ordered accordingly.*

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SMITH, administrator, etc., v. BRITTON, appellant.

2 T&C498 *Action by administrator, upon a judgment — leave of court to sue — Answer after*  
 40 Mis' 95 *demurrer.*

An action brought by an administrator upon a judgment recovered by his intestate, is not "between the same parties," within the meaning of section 71 of the Code, requiring leave of the court to sue.

Defendant demurred to the complaint, and the demurrer being overruled did not appeal, but answered setting up the same ground argued in the demurrer. *Held*, that the decision of the demurrer did not preclude him from doing so, or estop the court from again considering the question.



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APPEAL from a judgment in favor of plaintiff, on a trial before the court, without a jury. The material facts appear in the opinion.

*W. Britton*, appellant in person. For the purposes of section 71 of Code of Procedure, this action is between the "same parties," as the original action. 1 Abb. 83; Code, § 283; *Graham v. Scripture*, 26 How. Pr. 501, 507.

*C. Bainbridge Smith*, respondent, in person. Section 71 of Code does not apply. 45 How. 428; 12 id. 537; 1 Abb. 84; 2 Hilt. 69. Defendant having demurred, cannot raise the same question by answer. 37 N. Y. 372; 4 Abb. N. S. 340. The objection to the complaint, if taken by demurrer, would have been, that plaintiff had not legal capacity to sue, and defendant, by answering the complaint, is deemed to have waived that objection. Section 144 and 147 of Code; 18 Abb. 191; 37 N. Y. 648; 40 id. 410; 5 Duer, 672. In *Graham v. Scripture*, 26 How. 501, what was said by the court is mere *obiter*. In *Hastings v. Farmer*, 4 N. Y. 293, the court had no jurisdiction of the person of the defendant.

DAVIS, P. J. This action was commenced on a judgment recovered in the court of common pleas of the county of New York, on the 8th of October, 1861, in favor of James N. Richards against the above named appellant. Richards, the plaintiff in the judgment, having died, the present plaintiff was duly appointed administrator of his estate, and afterward commenced this action on the judgment. He did not aver in his complaint that he had leave of the court to bring the action. The defendant demurred to the complaint, assigning as the ground of demurrer that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled at special term, the point of the decision being, that the action on the judgment is not between the same parties within the meaning of section 71 of the Code, and therefore leave of the court to sue was not necessary. *Smith v. Britton*, 45 How. 428.

The defendant had leave to amend, on payment of costs, and thereupon answered that the action is brought "between the same parties without leave of the court, and without notice to the defendant." On the trial, the court found that the action was brought without leave, that the demurrer had been interposed and

decided as above stated; and held, as a conclusion of law, that leave of any court to commence this action was not necessary.

It is now insisted by the plaintiff, that the decision of the special term on the demurrer, not having been appealed from, became the law of the case, and, whether right or wrong, is binding upon the defendant against whom it was pronounced. This proposition is not sound. Of course, if judgment had been entered upon the decision, that would have been conclusive upon the parties, until reversed or set aside; but leave having been given to answer over, on payment of the costs of the demurrer, the defendant was at liberty to avail himself of that alternative. Having done so, the demurrer is regarded as withdrawn, and the case stands for trial, upon the issues of fact formed by the present pleadings. The decision of the demurrer does not operate as an estoppel, but of course the judge at circuit would regard the opinion pronounced upon deliberate examination at special term with the respect due it, under the circumstances, and, doubtless, as a rule, would accept it as a correct exposition of the law.

The case is here for review, upon the principal question, and that is, whether an administrator of a deceased plaintiff is within the phrase, "the same parties," as used in section 71 of the Code. It is quite clear that an administrator was not within the meaning of that phrase at the time of the first enactment of the section. He could not then issue execution, nor make a motion for leave to issue execution (*Jay v. Martine*, 2 Duer, 654; *Thurston v. King*, 1 Abb. 126; and *Wheeler v. Dakin*, 12 How. 537); and his only remedy seems to have been by action, in place of the former writ of *scire facias*, and that proceeding was held not to be an action between the same parties, so as to require leave to commence it. *Cameron v. Young*, 6 How. 372; *Wheeler v. Dakin*, *supra*.

In 1866 the legislature amended section 283 of the Code so that executions can be issued on judgments in case of the death of the plaintiff by "his personal representatives, duly appointed," at any time within five years after the entry of the judgment. In this case more than five years had elapsed before the action was brought, but that fact was not made a point in the court below, and ought not to be controlling here.

The real question is, whether the authority now given to personal representatives to issue execution, after the death of a plaintiff whom they represent operates, to bring them within the meaning of the

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words "the same parties," as used in section 71. For reasons assigned by VAN BRUNT, J., on the decision of the demurrer in this case at the special term (see 45 How. 428), we think the plaintiff does not come within the prohibition.

Section 71 has, in all the cases arising upon it, received a restricted construction. The words "the same parties" have a very definite signification, and the courts have not been disposed to extend their meaning. See *Dean v. Eldridge*, 29 How. 218; *Lane v. Salter*, 4 Rob. 239; *Tufts v. Braisted*, 1 Abb. 83; *Clark v. Story*, 29 Barb. 295, and cases above cited.

The judgment appealed from should be affirmed.

DANIELS and DONOHUE, JJ., concurred.

*Judgment affirmed.*

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BRINKLEY v. BRINKLEY, appellant.

*Practice — trial by jury — feigned issue.*

After an equity case has been tried and finally submitted for decision, the court, at special term, has the power, of its own motion, to direct certain issues therein to be passed upon by a jury, if the case be one in which, under similar circumstances, the late court of chancery was authorized to direct a feigned issue.

The Code has not changed the former practice in respect to feigned issues, except so far as to substitute a simple interrogatory for the legal fiction of a wager.

A dictum in *O'Brien v. Barnes*, 4 Bosw. 657, questioned and limited.

APPEAL from an order of the special term in an equity case directing, of its own motion, certain issues to be sent to a jury after the case had been tried and finally submitted for decision.

The action was brought for a limited divorce and alimony.

The questions raised by the pleadings are: 1. The residence of the plaintiff. 2. Whether there was a marriage. 3. Whether there was an abandonment. 4. Whether there was another action pending for the same cause in the courts of Tennessee?

On the 13th of August, 1872, a motion was made to settle these issues and send them to a jury, which was denied, upon the ground

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that the motion had not been made within the time required by the rules and practice of the court.

On May 13th, 1873, an order was made by consent, sending the case to the circuit for trial, and it was stipulated that this trial should be by the court, without a jury.

The action came on for trial before Mr. Justice VAN BRUNT, without a jury, on June 3, 1873, and continued, from day to day, until June 13th, when it was finally submitted for decision. Subsequent to such submission, the court, of its own motion, made an order settling the issues of fact in the case, and directing them to be tried by a jury. From this order this appeal was taken.

*William Henry Anthon*, for appellant. The original motion to frame issues was properly denied. Trial by jury was expressly waived by the parties in open court (Code, § 266), and by their entering into the trial without a jury (*Greason v. Keteltas*, 17 N. Y. 498), as well as by their consent in writing. After trial commenced, it was too late to apply for issues. *People v. Albany, etc., Railroad Co.*, 7 Abb. N. S. 265; *O'Brien v. Bowes*, 10 Abb. 106. The court cannot direct issues after trial. *O'Brien v. Bowes*, 4 Bosw. 663. The decision must be filed in twenty days after trial. Code, § 267; *Coit v. Bland*, 12 Abb. 463.

*W. A. Beach* and *A. C. Brown*, for respondent. The court had power to make the order. It is a substitute for the submission of a feigned issue under the old practice. *Vermilyea v. Palmer*, 52 N. Y. 471. The court of chancery of England has always exercised this power (*Fisher v. Taylor*, 2 Hare, 218; *Raine v. Cairns*, 4 id. 327; *Trent v. Hanning*, 10 Ves. Jr. 495; *Stokes v. Edmeads*, McCl. & Y. 436), and in New York (*Munson v. Reed*, Clarke, 580), and in England even the appellate court. *Earle v. Pickin*, 1 Russ. & Mylne, 547; *Rhodes v. Beauvoir*, 6 Clark & F. App. Cas. 532. The award of issues is entirely in the discretion of the court. *Lansing v. Russell*, 2 N. Y. 563; *Candee v. Lord*, id. 277; *Wood v. Mayor*, 4 Abb. N. S. 152; *Birdsall v. Patterson*, 51 N. Y. 43; *Vermilyea v. Palmer*, *supra*.

**BARRETT, J.** The question presented by this appeal is, whether the court at special term, after trying an equity case, which remains in its hands under advisement, has power of its own motion to direct certain issues therein to be passed upon by a jury.

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If, under similar circumstances, the late court of chancery was authorized to direct a feigned issue, we think the question must be answered in the affirmative; for the reason that, in our judgment, the Code of Procedure has not changed the former practice, except so far as to substitute a simple interrogatory for the legal fiction of a wager. Section 72, in abolishing feigned issues, expressly provides that, "instead thereof, *in the cases where the power now exists* to order a feigned issue, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried." Under section 254 all issues, other than those specified in section 253, are "triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury." Section 469 preserves the then existing rules and practice of the courts in civil actions, so far as they are consistent with the Code of Procedure.

These three sections are in entire harmony, and they indicate a thoughtful design, running through the entire Code, of preserving the substance of the old practice as to feigned issues, and of abolishing only its cumbersome and useless forms. This, too, has been its practical effect. The court, at special term, like a court of chancery, frames the issue and sends it to the circuit for trial. It is done for the purpose of advising the conscience of the court. The effect of the verdict is also the same. The special term is not absolutely bound thereby. It accepts or rejects it in whole or in part, or it takes further testimony and finally pronounces the judgment, the verdict being merely an aid in enabling the court to arrive at a satisfactory result. *Birdsall v. Patterson*, 51 N. Y. 43; *Snell v. Loucks*, 12 Barb. 385; *Vermilyea v. Palmer*, 52 N. Y. 47. These, too, are important qualifications of the general rule stated in *O'Brien v. Bowes*, 4 Bosw. 666, that "our present system assimilates the practice in all actions, whether of law or in equity."

The question then recurs as to the power of the court of chancery with respect to the awarding of feigned issues. It is not doubted that this power was possessed at the hearing. Indeed, previous to the acts of 1838 and 1839, the practice of that court was not, in general, to grant an issue until after the testimony was taken in the case. *New Orleans, G. L. & B. Co. v. Dudley*, 8 Paige, 455. The chancellor then said that even "if an issue is refused" before the hearing, "it may still be necessary or proper for the court to award an issue at the hearing, in case there should be such a con-

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flict of testimony" upon a given point as to render it doubtful. This case was cited in *Church v. Freeman*, 16 How. 297, and Mr. Justice HARRIS there held that the practice was substantially the same under the Code.

In *Munson v. Reed*, Clarke, 580, it was held that on the hearing of a cause where important rights depend upon a question of fact, and the testimony is doubtful, the court may, on its own motion, order a feigned issue; and in *Gardner v. Gardner*, 22 Wend. 536, COWEN, J., speaks of "the general incidental power of the court of chancery to award an issue in all proper cases."

It is difficult to perceive why this useful power, so freely exercised upon the hearing, should be lost the moment the court becomes possessed of the final argument, and expresses the intention of taking time to consider its judgment.

The question, after all, is whether the testimony is sufficiently conflicting to cause doubt. Must that doubt spring up at once from the rapid examination and running comments at the hearing? May the court not take the testimony, and may not the doubt be born of its careful perusal, and of quiet and mature reflection thereon?

This is not an evasion, but rather the comprehension and acceptance of the full measure of judicial responsibility. There would be more color for such a charge where the issue is directed *upon the hearing*, before the testimony has been sufficiently analyzed and weighed to justify a conviction as to the existence of a really doubtful conflict.

Nor is it, as claimed by the defendant, a refusal to give him the benefit of the legal rules as to doubt; no more so than if the issue had been directed at the hearing. The rule contended for would put an end to the entire practice of taking the opinion of a jury in aid of the judicial judgment. Doubt would be summarily solved whenever the scales appeared to a single mind to be equipoise. Clearly, the general rule is not interfered with because proper and well-established means of removing doubt are resorted to. If, after the verdict has come in, and the cause is submitted to the court upon such verdict, in connection with all the testimony, the doubt remains, it will then be time enough for the defendant to claim that the plaintiff, holding the affirmative of the issue, must fail.

The order in question is not only defensible in principle, but it is supported by precedent. As far back as 1740, Lord HARDWICKE

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passed upon the legal effect of certain testimony in a cause, assuming such testimony to be true, but inasmuch as the contradictory evidence raised a doubt as to its truth, his lordship directed an issue on that question. *Richards v. Syme*, Barnardist. Ch. 90. This cause had been fully argued and submitted for judgment, which seems to have been pronounced orally — that is to the extent indicated — upon the conclusion of the hearing and arguments.

Such was always the rule of practice in England. *Fisher v. Taylor*, 2 Hare, 218; *Raine v. Cairns*, 4 id. 327; 12 Cl. & F. 833; *Trent v. Hanning*, 10 Ves. 495; *Attwood v. Small*, 6 Cl. & F. 232; *Stokes v. Edmeades*, McCl. & Y. 436. Many other citations might be added. In fact, the books are full of cases where issues have been directed after the final arguments and the submission of the cause for judgment.

In some of the cases issues were directed, in others actions at law. Whatever the particular procedure, it was adopted at every conceivable stage of the case; not only at the hearing, not only after the first arguments and submission, but after final judgment; in some instances, even upon appeal, the chancellor and the house of lords directing the issue. *Earle v. Pickin*, 1 Russ. & Myl. 547, was such an appeal, and "the lord chancellor," says the reporter, "ultimately ordered that the decree should be varied by directing the parties to proceed to a trial at law, upon the following issue," specifying it. *Rhodes v. Beauvoir*, 6 Clark & Finnelly App. Cas. 532, was an appeal to the house of lords. The reporter states that "after a great deal of argument, and consideration during the argument, and on several days afterward by the lord chancellor (Lord BROUGHAM), Lord ELDON, Lord PLUNKET and Lord WYNFORD, it appeared to their lordships to be the best course to direct issues; and, accordingly, it was ordered and adjudged that the cause be remitted to the court of chancery, with instructions according to the course of that court for the framing of issues in a court of law."

It was also a common practice for the chancellor to decide the principal questions in the cause, and then to direct an issue as to some one remaining question about which he was in doubt.

The issue in *Munson v. Reed*, above cited, from our own courts, was after the first submission of the cause to the vice-chancellor, who gave the direction at the close of a written opinion upon the whole case.

We have treated this subject more elaborately than would have

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been deemed necessary but for the *dictum* of so distinguished a jurist as Mr. Justice WOODRUFF in *O'Brien v. Bowes*, 4 Bosw. 657. We say *dictum*, because it is quite evident, from an examination of the case, that the discussion of the present question was not necessary to the decision of the precise points appearing upon the record. What was complained of in that case was an order "dismissing the complaint without costs, unless the plaintiff apply, within five days after the service on her attorney of a copy of this order, for a trial of the questions of fact in this action under the Code, in which case the question of costs is reserved." Whatever may have been the intention, this, upon its face, was not a suspension of judgment until further light could be afforded. In fact, it *was* a judgment, though a species of conditional one which was wholly unauthorized under any system; and it gave the plaintiff leave to apply for that to which, at such a stage of the case, she was clearly not entitled. We agree that the reversal of such an order was perfectly correct, but we cannot concur in the incidental remarks of the learned judge, to the effect that the court was without authority to direct the issue of its own motion.

Judge WOODRUFF does not deny that such power was vested in the court of chancery. "We are aware," he says, "that the court of chancery was accustomed, when not satisfied by the proofs as they were exhibited, to order a cause to stand over for the production of further proofs." He bases his opinion entirely upon the effect of the Code. "Whatever might have been the powers of a chancellor," he remarks, "the Code has allowed him (the judge at special term) no choice." \* \* \* "When the parties have closed their evidence and submitted the cause, the judge has no alternative; *he must decide.*"

We think this is stated too unqualifiedly. It is undoubtedly the duty of the judge to decide the case. Under section 267, it is even his duty to file his decision within twenty days—a provision, however, which is merely directory. Yet it will scarcely be doubted that the judge may order a re-argument of the cause. Even after he has decided, he may, if convinced that he has overlooked important evidence, or a decisive authority, grant a rehearing. Pending such re-argument or rehearing, the cause cannot be said to be absolutely *sub judice* and an issue may be directed upon the same principle which governs upon the hearing. For instance, in the present case, had Judge VAN BRUNT thought that his doubts might be



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removed by further hearing of counsel, and accordingly directed a re-argument, the case would then have stood, with respect to this debatable power, quite as it did upon the original summing up. The case would be still upon trial, and the court, previously bound in a general way to decide, could then exercise the privilege, which it undoubtedly possesses, of directing an issue at the trial. Here the court has simply done that directly which would scarcely have been questioned, if it had resulted, indirectly, from an intervening re-argument. Nor is this affected by the completion of the testimony. In chancery, the cause was brought to a hearing upon testimony which was taken out of court, and consequently, when the cases speak of the power of the court to decide an issue, *at the hearing*, they refer to the argument of the cause upon completed testimony.

It is also said in *O'Brien v. Bowes*, that "a trial cannot regularly be begun in one term and be finished at another." The conclusion arrived at by this learned judge, from this proposition, would practically limit the court, in directing an issue of its own motion, to cases where its necessity has not been developed. It would prevent an issue at the hearing, quite as much as after final submission. Indeed, it would be difficult to imagine a case where the procedure in question would be available at all. In the ordinary course, the court knows nothing of the nature of the issues, and can have no opinion as to whether a verdict is needed until at least the case is being opened. But the trial is then commenced, and if it must be finished before the adjournment, the issue, if directed, must be returned before such adjournment—in most cases a practical impossibility. *A fortiori* where evidence has been taken.

We do not, however, understand the cases to justify the proposition thus broadly put, and in the almost daily practice at special term it has certainly been ignored. It is undoubtedly settled that "a trial by the court cannot properly be had before several judges in succession, so as, after being decided in part by one, to be taken up at another term and completed by another justice." *Belmont v. Ponvert*, 3 Rob. 693.

This is as far as the cases go; and, indeed, in the opinion delivered in *Belmont v. Ponvert*, which is later than *O'Brien v. Bowes*, and in the same court, we find this language: "I see no reason why a judge, sitting as in equity, at special term, may not so far follow the practice in the old court of chancery as to hear proofs and

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determine, *in his own mind*, a portion only of the issues, and, after sending the case to a referee to take and report further proofs, again take it up on the coming in of such report, either during the same or at a subsequent term, and then, upon hearing counsel, render a final judgment. There is nothing in the Code expressly prohibiting such a course, and it appears to me the last clause of the 468th section may well be so construed as to authorize it; even conceding, as I do not, that any legislative authority is necessary to give that power to courts in equity cases."

It must not be overlooked, as it seems to have been in *O'Brien v. Bowes*, that the trial is not by *the judges*, but by *the court*. The case may be commenced, and may go over to another term, but it is still in the court and triable by the court. As a matter of convenience, the judge who originally presided would doubtless arrange to sit at the final hearing, but his absence would not prevent the bringing on of the cause upon the verdict, and all the testimony and proceedings. The cause would be then heard by *the court*, and it would be practically of but little moment whether such hearing should be deemed a continuation or a re-commencement of the trial. But this subject need not be pursued further. The effect of the order is not now before us for independent adjudication, and therefore we need say no more than that the questions respecting the subsequent procedure in the cause present no such difficulties as, of themselves, to throw doubt upon the power which was exercised at the special term.

The order appealed from should be affirmed, with costs.

DAVIS, P. J., and DONOHUE, J., concurred.

*Order affirmed.*

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GOODENOUGH, appellant, v. SPENCER.

*Fraudulent conveyance—attorney and client—undue influence—purchasers with notice.*

A transfer was made by an embarrassed client, of all his personal property, to his attorney and counsel under the advice and suggestion of the latter, without any actual consideration, but for the purpose of having the property held by the attorney for the sole use and enjoyment of the client, so long as it was in danger of being seized by his creditors, and then of restoring the formal title to the client. *Held*, that, as between the parties, this transfer

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was void, and should be annulled for the purpose of relieving the client, if that could be done without injury to an innocent purchaser.

And the attorney having assigned the bill of sale of the property to a party who had notice, before he took the assignment, that the bill of sale was given by a client to his attorney for professional services, and that the property still remained in the possession of the client; *held*, that the fact of the assignee's failing to make the inquiry suggested by the vendor's continued possession was sufficient to render him responsible for all the information such an inquiry would have secured. And that that affected the title he acquired with all the infirmities it had in the hands of his assignor.

*Held*, also, that under this defect in the assignor's title, the assignee stood precisely where his assignor did before the assignment, holding it in subordination to the vendor's right to annul the sale, as being the result of undue influence exercised by his attorney and counsel over him in procuring it.

APPEAL from a judgment in favor of the defendant entered upon the report of a referee.

The evidence in the action showed, and the referee found, that, on the first day of March, 1870, the defendant executed and delivered unto Samuel Stevens, then his attorney and counsel in legal proceedings, a bill of sale of household furniture, horses, cattle, sheep, wagons, harness, grain and hay, then being in, upon and about his dwelling-house and farm, situated in the town of York, Livingston county, and State of New York. The consideration recited in the bill of sale was \$5,000, paid by the defendant to him for certain counsel fees and moneys for legal services due, or to become due, in certain matters at the date of the bill of sale in the hands of the vendee, including suits at law and other matters of adjustment, counsel and advice, disbursements and moneys paid, laid out and expended, costs and charges, and other good and valuable consideration. The property included in the bill of sale was of the value of \$5,000; and, at the time of its execution and delivery, the defendant owed the vendee not exceeding the sum of \$400; but that sum was found to form no portion of the actual consideration for which the bill of sale was given. The defendant was then in embarrassed circumstances, and was about to be examined in supplementary proceedings taken on a judgment recovered against him; and at the suggestion of the vendee, his attorney and counsel, he executed and delivered the bill of sale to him, in order to prevent the property referred to in it from being appropriated by his creditors to the payment of their debts, upon the agreement, on the part of the vendee, that he would transfer it again to the defendant after

his financial difficulties had been overcome. After the execution and delivery of the bill of sale, the defendant remained in the undisturbed possession of the property mentioned in it, as it was understood between the parties to it that he should, at the time when it was delivered, and used and enjoyed such property as his own.

On or about the 12th day of August, 1870, Samuel Stevens, the vendee in the bill of sale, procured from the plaintiff the sum of \$2,500, and delivered to him a written assignment of the bill of sale, accompanying the bill of sale itself. The assignment was absolute in its form, but the plaintiff, under date of the 13th of August, 1870, entered into an agreement with Stevens, by which he agreed to assign the bill of sale back to him for the sum of \$3,000, to be paid on or before the 1st day of November, 1870.

During the defendant's examination, in the supplementary proceedings, he testified that he had conveyed his personal property to his counsel, Samuel Stevens, for services. Before the plaintiff took the assignment of the bill of sale, he was informed that the defendant had given that testimony. But it appeared on the trial, according to the conclusion of the referee, that the statement was made under the suggestion and advice of the defendant's attorney and counsel, the vendee in the bill of sale. Before the assignment of the bill of sale, the plaintiff was advised by his own counsel that he could safely purchase the same, and by doing so would acquire title to the property described in it. The plaintiff took the assignment of the bill of sale, relying on that advice, and upon the evidence given concerning it on the supplemental examination, and the statement contained in the bill of sale itself, believing that by doing so he would acquire a good title to the property described and mentioned in it. At the time of the assignment it was orally agreed between the plaintiff and Stevens that the plaintiff should not interfere with the property in the bill of sale for the period of sixty days. And the plaintiff was also informed by Stevens that he was the defendant's attorney and counsel; that he had been employed by him in various suits and other matters, for which the defendant owed him a large sum of money, and that the bill of sale was given for such services, and was regular and proper. He also informed the plaintiff that the property was in the possession of the defendant, at his farm or place in Livingston county, and had continued in his possession since the execution of the bill of sale. All this information was communicated to the plaintiff before he took the assign-

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ment of the bill of sale. Proof was also given from which it was found that the plaintiff had no knowledge or notice of the realstate of the transaction, as it existed between the defendant and his attorney and counsel. The defendant refused to deliver the property to the plaintiff, and this action was brought for the recovery of its possession. The referee reported in favor of the defendant, and from the judgment entered on the report the plaintiff appealed.

*D. & T. McMahon*, for appellant. The plaintiff was a purchaser in good faith. Defendant was estopped from denying the validity, consideration or *bona fides* of the bill of sale, as against plaintiff: (a) By his covenant of warranty therein (1 Paige, 473; 57 Barb. 414); (b) by the recitals of the consideration (9 Wend. 209; 3 Keyes, 84); (c) by his oath on examination (30 N. Y. 225, 519; 37 Barb. 383; 1 E. D. Smith, 543).

*Scott Lord* and *Theron G. Strong*, for respondent.

DANIELS, J. Although the character of the transaction which resulted in the execution and delivery of the bill of sale, from the defendant to his attorney and counsel, was in dispute upon the trial, the evidence was sufficient to justify the referee in the conclusion he adopted concerning it, and for that reason that conclusion must now be accepted as exhibiting the transaction in its true light. It was, in brief, a transfer made by an embarrassed client to his attorney and counsel, under the advice and suggestion of the latter, without any actual consideration, but for the purpose of having the property held by him for the sole use and enjoyment of the defendant so long as it was in danger of being seized by his creditors for the payment of their debts, and after that danger had been successfully avoided, restoring the formal title again to the defendant; and that intention appears to have been observed until the vendee undertook to transfer the property to the plaintiff, for the consideration he received for doing so, on the assurance that the bill of sale was regular and proper.

By the statutes of the State, a transfer of property, made by a debtor for the purpose of withholding it from the satisfaction of the lawful demands of his creditors, is prohibited; and the person who receives as well as the one who transfers the title, for the promotion of such a design, are both rendered so far criminal as to be guilty of a misdemeanor. 3 R. S. (5th ed.) 971, § 3. In the consumma-

tion of this transaction, both parties to it involved themselves in the guilt of this offense, and the vendee cannot shield himself from its consequences by reason of the circumstance that its commission arose out of the advice sought, for his protection, by an embarrassed or insolvent client. No attorney or counsel has the right, in the discharge of professional duties, to involve his client, by his advice, in a violation of the laws of the State. And when he does so, he becomes implicated in the client's guilt when, by following the advice, a crime against the laws of the State is committed. The fact that he acts in the capacity and under the privileges of counsel, does not exonerate him from the well-founded legal principle which renders all persons who advise or direct the commission of crime, guilty of the crime committed, by compliance with the advice or in conformity with the directions which may be given.

But while both the attorney and his client may be rendered criminally guilty in such a transaction, the law does not allow the attorney to profit by it where it results in an apparent advantage to him from compliance with the advice given by him. The relation existing between attorney and counsel and client is one of trust and confidence, placing the interests and rights of the client very much under the guardianship and control of the counsel, and liable to abuses resulting in serious and lasting injury to the client. The law regards the client as very much under the influence and control of the attorney and counsel, while the ordinary professional relation exists between them, and for that reason the conduct and acts of the latter are closely watched and scrutinized. If he bargains with the client, while the relation exists, to his own advantage and the detriment or prejudice of the client, the law attributes the result to the use made of his undue influence over the conduct of the client, and in the absence of satisfactory evidence of good faith on the one part, and entirely voluntary action upon the other, sets aside and annuls the transaction. So decided are courts of justice in the observance and enforcement of this principle, that the attorney or counsel will not be permitted to retain the fruits of even an unlawful contract, where, under ordinary circumstances, no relief would, on account of the illegality of the enterprise, be awarded to either party. Where one party, through the means of an unlawful agreement, acquires the property of another, the law regards them as equally in fault, and will do nothing for the redress or protection of either side. But when that advantage is secured

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by an attorney or counsel from his client, the parties are not considered as being equally in the wrong. The law then regards the client as being drawn into the violation of its provisions through the controlling influence of his attorney and counsel over him, and for that reason intervenes for his protection. Hence, in a transfer like that made by the defendant to his attorney and counsel, by the bill of sale which was executed and delivered in this instance, although both parties to it violated the law, the defendant was not equally in the wrong, and the transfer will be annulled for the purpose of relieving him, if that can be done without injury to an innocent purchaser. *Ford v. Harrington*, 16 N. Y. 285; *Freelove v. Colo*, 41 Barb. 318; *Evans v. Ellis*, 5 Denio, 640; *Howell v. Ransom*, 11 Paige, 538.

But that relief will not be carried so far as to disturb the rights of an innocent third person who, in good faith, may have been induced to part with his money or his property, relying upon the title the attorney and counsel had the apparent right and power of transferring; the rule in that case being, that where one of two innocent persons must suffer by the fraud or misconduct of a third, the loss shall be borne by him who conferred upon the wrong-doer the means of deceiving persons honestly dealing with him. *Rawles v. Deshler*, 3 Keyes, 572; *Whittick v. Kane*, 1 Paige, 202, 208.

Under this principle, even though the transfer of the defendant's property to his attorney and counsel would be at once set aside as between them, the redress could not be so far extended as to annul the plaintiff's title, if he had been entirely justified in his conclusion that the defendant had parted with all his rights and interest in the property sold. But he was not, for he omitted one important indication of the continued existence of those rights, arising out of the circumstance that the property still remained in the defendant's possession. And, in addition to that, he was required to stipulate that it should continue in that condition for the period of sixty days after the assignment of the bill of sale to him. These circumstances were not consistent with the existence of an indefeasible title in the person the plaintiff dealt with. They unmistakably pointed to the fact that the defendant had, or claimed to have, some interest in or right to control the property his vendee proposed to sell, notwithstanding the recitals in the bill of sale, the assurances the plaintiff received and the evidence the defendant had previously given. And the plaintiff should have applied to the defendant for

the information which these circumstances admonished him might be given, if he had designed to follow the dictates of reasonable prudence, and in that manner to guard himself against loss arising out of the purchase of another person's property. The fact that he failed to make the inquiry the defendant's possession suggested the propriety of, is sufficient to render him responsible for all the information which such an inquiry would have secured. And that affects the title he acquired with all the infirmities it had in the hands of the man from whom he obtained it. *Williamson v. Brown*, 15 N. Y. 354, 361-2; *Grimstone v. Carter*, 3 Paige, 421; *Reed v. Gamon*, 50 N. Y. 345, 349-50; *Baker v. Bliss*, 39 id. 70.

Under this defect in the plaintiff's title he stood precisely where his assignor did before the assignment, holding it in subordination to the defendant's right to annul the sale as the result of the undue influence his attorney and counsel exercised over him in procuring it.

The learned counsel for the plaintiff is entirely right in his position, that the admissions and declarations of Stevens in contravention of his title were not admissible as evidence on the trial of this action, and if any of the oral or written statements made by him and received during the trial had the least bearing on the conclusions arrived at by the referee, the judgment would necessarily be reversed. But they did not, for they were mostly on immaterial inquiries having no influence by way of proof on any of the material facts in the case. The most important of all was the direction or suggestion to the defendant himself, that he should return to Genesee and instruct his counsel there to have the assignment set aside at once as it was of no value whatever, as he had never taken possession under it. The only fact this statement had any tendency to prove was the circumstance that Stevens or the plaintiff never took possession of the property sold. And that was in no way disputed in the case. It was not pretended by any one that either Stevens or the plaintiff ever had possession of the property. On the contrary, the fact was beyond dispute the other way.

There was no impropriety in excluding what was said about not putting the bill of sale upon record, because it was in no sense a security while it stood in the hands of Stevens. If it was valid in his hands at all, it was as an absolute title. As it cannot be maintained in that form, there could be no materiality in any reason suggested for not putting it upon record. The referee has negatived



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the idea that it might have been designed as a security. For that reason it was not such an instrument as the law required or allowed to be placed upon record. The case presents no ground on which the judgment can be properly disturbed. It should, therefore, be affirmed, with costs.

DAVIS, P. J., and DONOHUE, J., concurred.

*Judgment affirmed.*

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DEPEW, appellant, v. DEWEY *et al.*

*Mortgage—foreclosure and sale—when court will not set aside—Laches—Appealable order.*

Plaintiff holding a mortgage foreclosed it by action, and the mortgaged premises were, under the judgment in said action, sold July 7, 1857. The owner of the equity of redemption was not served personally in the action, but was, in 1858, told by her husband, who had charge of her property, that the premises had been sold to pay interest, and that there was no relief. In the summer of 1870 she first learned all the facts of the sale, and, in October, 1871, moved to have the judgment of foreclosure and the sale set aside upon her paying the mortgage debt. *Held*, that it was too late to apply for an opening of the judgment and sale. The notice given the owner of the equity of redemption in 1858, was sufficient to put her on inquiry, and imposed upon her the duty of diligence in asserting her claim; and further, that after gaining full knowledge of the facts in the summer of 1870, she was limited to a year thereafter in which to make her motion, and, not doing so within that time, was guilty of laches and not entitled to succeed.

The judgment and sale were opened by the court below. *Held*, that the order was not discretionary, but affected a substantial right and was appealable.

THE appeal in this cause is taken from an order made at special term, on the 7th day of July, 1873, setting aside a judgment recovered for the foreclosure of a mortgage assigned to the plaintiff, the sale made under the judgment on the 17th day of July, 1857, and the sheriff's deed given the plaintiff on such sale, on payment to the plaintiff of the amount due on the mortgage foreclosed, and another mortgage held and owned by him at the time of the foreclosure and sale, or bringing the same into court and depositing the amount with the clerk; and directing that the mortgages should be discharged and canceled of record, together with the bonds, upon

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such payment or deposit, and that upon receiving from the plaintiff a full release, under seal, of all claims against her for interest on the mortgages, and all sums paid out for taxes, assessments, insurances or otherwise, on the mortgaged premises, and receiving from him the amount of the rents, issues and profits of the premises since the date of the report of the referee appointed to report the facts pending the motion, viz., the 6th of June, 1872, and taxes and assessments for the same period, the defendant, Cynthia B. Dewey, should release him from all claims to any of the rents, issues and profits of the mortgaged premises during the time of the plaintiff's possession to the date of such report; and that, within five days after such payment or deposit of the amount due on such mortgages at the time of sale, the plaintiff should yield up and surrender to the defendant, Cynthia B. Dewey, peaceable and quiet possession of the mortgaged premises; and that the releases to be given should be executed and delivered within five days after the payment or deposit in court of the amount so due on the mortgages.

It appeared in support of the motion in which this order was made, that the defendant, Cynthia B. Dewey, became the owner of the equity of redemption in the mortgaged premises, subject to such mortgages, and which she assumed to pay, on the 5th day of May, 1856. That one of the mortgages was foreclosed in this action, which was commenced in the spring of 1857. The summons was not served upon her, she being at the time absent from the city; but her husband (who procured the property to be conveyed to her for a consideration supplied by him, without her knowledge or procurement, and afterward, with her permission and allowance, controlled and managed the property in her behalf) employed an attorney for her as well as himself, who appeared for them both in the action. She had no knowledge of the employment of the attorney on her behalf, and never conferred any direct authority upon her husband authorizing such employment. She knew nothing of the proceedings in the foreclosure action until after judgment had been recovered, and the property had been sold. After that, and as she stated in her affidavit used on the hearing of the motion, "sometime during the summer of the years 1857 and 1858, she asked her husband if the rent had been paid for said premises, when she was informed by him that the premises had been sold to pay interest, and that there was no relief; that she could not find her deed, and having no

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knowledge of legal matters, and at said time having confidence in the statement of said Dewey, she made no further inquiry into the matter." She further added, "that she never knew of said foreclosure proceedings until the summer of 1870; that she never heard of them in any manner whatever until said time." This affidavit was sworn to, and notice of the motion given on the 6th day of October, 1871. The attorney for the plaintiff acted in good faith, supposing that the attorney who appeared for the owner of the equity of redemption was empowered to act as he did in her behalf. It appeared further, by the affidavit of Mrs. Dewey, that when the plaintiff became the purchaser at the foreclosure sale, under the judgment, he took a deed of the premises, and had ever since remained in possession of the same; and, on her information and belief, that when he purchased he did so for the benefit of himself and brother, and, in the year 1871, conveyed one-half of them to his brother's widow, who was said brother's sole legatee. The deed of the premises to Mrs. Dewey contains a recital that it was given for the consideration of \$4,000. Notice of the motion does not appear to have been given to the plaintiff's grantee of one-half the premises, and she does not appear to have been represented on its hearing. The other material facts appear in the opinion.

*J. E. Burill*, for appellant.

*Edgar S. Van Winkle*, for respondent.

DANIELS, J. It was objected, for the defendant, on the argument of the appeal, that the order made was discretionary, and that no appeal could be taken from it by the plaintiff, and the cases of *Tallman v. Hinman*, 10 How. 89; *Kingsland v. Bartlett*, 28 Barb. 480; *Wakeman v. Price*, 3 N. Y. 334; *Buffalo Savings Bank v. Newton*, 23 id. 160, and *Foots v. Lathrop*, 41 id. 358, are relied upon as supporting the objection. But in those cases the orders appealed from either set aside the sales made and opened the judgment, or denied the application for that relief; and for that reason were held to be discretionary, and not to affect substantial rights. It was not claimed in either that the motion was not made within the time required, in the observance of due and proper diligence, and for that reason the cases may be regarded as free from all objection in that respect. They may very well have been held

not to be properly appealable, without in the least degree affecting the rights of the parties in this case, for the court simply deprived the parties appealing from the orders, of their right to the judgments recovered by them, and the sales made under them, without affecting their right to ultimate redress or disturbing fixed legal rights to property purchased by them. The proceeding included in the order extended no further than could be done in the use of an equitable and ordinary discretion, and was maintained throughout by equitable considerations.

While in the case now before the court the order not only set aside the judgment and sale under it, but beyond that adjudged to the moving defendant all the relief which, in a proper case, would be within the scope of an action in equity to redeem a mortgage; and that, too, after the period within which such an action could be maintained had been determined. Whether such extended relief could be properly administered upon a motion in any case, it is not now necessary to decide; but, assuming that it could, it does not follow that it could be done in a case where the rights of the parties had become fixed, as they were in this instance, under the plain language of the statute of limitations. For, as the relief awarded was the proper subject of an action to redeem, it was within section 97 of the Code of Procedure, requiring an action for relief not before provided for to be commenced within ten years after the cause of action shall have accrued. Before 1870 an exception existed in favor of married women, by which the disability of marriage extended the time to bring such an action for the period of five years; but in that year that exception was repealed (Laws of 1870, chap. 741, § 5), and the repeal rendered applicable to existing cases (*id.*, § 15), which left this case under the unrestricted control of the section referred to, limiting the time for the commencement of the action to ten years from the time the right to do so accrued. This amendment terminated the existence of the exception without any saving clause, and, as a necessary consequence, the time for commencing an action where the period provided by the preceding section had already expired. This was necessarily so, because it left that as the only provision relating to and controlling the case; and that, in plain terms, required the action to be commenced within ten years from the time when the cause of action accrued.

That this provision applies to and controls the time within which an action to redeem a mortgage must now be brought is well settled

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by the authorities (*Spoor v. Wells*, 3 Barb. Ch. 199, 203; *Hubbell v. Sibley*, 5 Lans. 51, and cases cited); and the cause of action accrued, where an action can be maintained against a purchaser of the mortgaged premises, as soon as he enters into possession under the foreclosure sale (*Miner v. Beekman*, 50 N. Y. 337), particularly when, as in this case, he enters as purchaser, and no subsisting right of action remains on the debt or the security by reason of its extinguishment by the sale made under the judgment.

Under these circumstances, the right of the plaintiff to the property purchased by him had become of an absolute and indefeasible nature when notice was given of the motion. The policy, as well as the express language of the law, was opposed to all disturbance of it at that time. The rights of the purchaser were of the most substantial nature, and the order divesting him of them was clearly appealable under subdivision 5 of section 349 of the Code. Such rights cannot be within the discretionary authority of a court on motion, when they have been deliberately protected by a formal statute enacted for that purpose. Any other rule would allow the court, upon motion, to defeat the statute of limitations altogether, and deprive parties of the freedom and repose from stale claims and demands which that legislation was designed to secure.

The courts have, therefore, found it to be a duty, where a party has lost his rights by lapse of time under statutory provisions relating to them, to deny motions made for relief after the time for affording the redress claimed has been allowed to expire without any application being made to secure it. Any other course would result in a nullification of the statutes, for it would do by indirect means what in substance the legislature had provided should not be done by any means. *Marston v. Johnson*, 13 How. 93; *Fry v. Bennett*, 16 id. 385; *Humphrey v. Chamberlain*, 11 N. Y. 274; *Wait v. Van Allen*, 22 id. 319; *Salles v. Butler*, 27 id. 638.

The proceedings in the action on which the judgment was recovered were technically regular, although the summons was not served personally upon the moving defendant, and she had given her husband no direct authority to employ an attorney. He probably supposed his authority to employ an attorney for her to be ample, inasmuch as she had derived the property to be affected by the proceedings through his act, and afterward intrusted it to his control and management; and the attorney prosecuting the action on behalf of the plaintiff had no reason to suppose that any defect

existed in the authority of the attorney who appeared for her in the action. On the other hand, it appears that the proceedings were carried on in good faith, upon the belief that no defect existed in the authority of the person appearing for her. If the motion to be relieved from the appearance had been made in time, it would have been within the discretion of the court whether to interpose, by setting aside the proceedings or not. *Hamilton v. Wright*, 37 N. Y. 502; *Foots v. Lathrop*, 41 id. 358; *Brower v. Nichols*, 42 id. 26. And where the difference between the amount due on the mortgage, and the value of the property as it is indicated by the consideration in the deed, is so inconsiderable, and the probability therefore so decided, that, by a personal service of the summons upon the defendant, the result, so far as the owner of the equity of redemption is concerned, would not have been changed, the court could very well deny the motion, if it had been made within such a period as reasonable diligence prescribed. For that reason it should, under the well-settled rules of practice, have been brought on with all reasonable dispatch, after notice was received of the change that had been made in the defendant's property, resulting from the default made in the payment of the interest due upon the mortgages she in her deed had assumed to pay. This was fairly due to the rights of the purchaser, who possibly could have protected himself against all serious prejudice to his rights if that course had been taken. In order to avoid unnecessary injury to the party relying upon the correctness of the proceedings under which his purchase may be made, motions of this description are required to be brought on as speedily as may be practicable after the discovery of the defect; and for that reason the Code has generally limited the period for such relief upon motions to one year after the party by notice has been apprised of what may have occurred, without his knowledge, to his prejudice. § 174.

The proceeding is one of an equitable nature, and the right to maintain it, therefore, controlled by equitable considerations. Accordingly, full and complete notice cannot be required before the duty to act arises. As in other proceedings of an equitable nature, the notice, which is fairly sufficient to put a person upon inquiry, will be sufficient to create the obligation of subsequent diligence. This is a rule of general application in cases of an equitable character, and, for that reason, properly controlling in proceedings of the description involved in this appeal (1 Story's Eq. Jur. [9th ed.],

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§§ 400, 401; 2 Parsons on Contr. [5th ed.], 671); where such a notice is stated to be "some notice or knowledge of a fact," which would imply, to a reasonable man, certain other facts, or would lead a person of ordinary caution into an inquiry which would certainly disclose those facts. *Lightbody v. North American Ins. Co.*, 23 Wend. 18; *Williamson v. Brower*, 15 N. Y. 354.

The notice which the defendant swears she received from her husband, in the summer of 1857 or 1858, was of this description; for she knew that the mortgages were upon the property, and that she had assumed their payment in the deed delivered to her. And when, in addition to that, she was told by her husband that the premises had been sold to pay interest, and that there was no relief, she must have inferred, from those circumstances, that it had been done by some formal proceedings. If she had desired to know any more about them, it then became her duty to make the inquiry. The reason why she did not do so is stated by her to be the fact that she had confidence in the statements of her husband. This concedes the duty which she felt was imposed by the information, while, at the same time, it attempts to excuse the omission. In that respect it is a failure, for her duty required her to inquire, if she had any disposition to place herself in a position to question the validity of the proceedings by which her title had been divested. This was an obligation which the rights of the other party required should be promptly performed, for in no other way could his interests be adequately protected.

By the further statement contained in the defendant's affidavit, it appears that complete knowledge of the proceedings was acquired by her in the summer of 1870, and, after that, she delayed giving any notice of a motion to set them aside until the 6th of October, 1871, a period of over one year. Relief, after such laches, is entirely inconsistent with the existing rules of practice, which require diligence for the purpose of avoiding unnecessary injury to the party who may be prejudiced by setting his proceedings aside. On this account, as well as the effect required to be given to the statute prescribing the period within which such relief, as was awarded, shall be given, the order appealed from should be reversed.

DAVIS, P. J., and BARRETT, J., concurred.

*Order reversed.*

PEOPLE *ex rel.* LEARY v. LANE, justice, etc.

*Landlord and tenant — summary proceedings — summons, when returnable.*

In proceedings under the statute, relative to summary proceedings to recover the possession of land, against a tenant holding over, the summons, in certain cases, may be made returnable in less than three days; but when so returnable, it must be on the same day it issues. A summons returnable the next day after it is issued is void.

CERTIORARI to Thaddeus H. Lane, justice of the district court of the city of New York, for the sixth judicial district, requiring him to send to this court the record in a proceeding before him, wherein he issued a warrant in favor of C. Enue Johnson & Co., landlords, against the relator as tenant, for the removal of the relator from certain premises in the city of New York, which premises it was claimed that relator occupied as their tenant, and wrongfully held over and continued in possession of after the "tenancy" had been terminated.

The affidavit on which the proceeding was based showed that the relator originally occupied the premises from May 1, 1869, to May 1, 1871, under a lease thereof to her for two years, *also that such occupancy during that period was at the will of the landlord*, and that on the 30th of April, 1871, the tenancy was determined. It further showed that, on October 14, 1873, a notice from the landlords was served on relator, requiring her to remove from said premises on or before the 14th of November, 1873, and that relator notwithstanding holds over.

On the 18th of November, 1873, the respondent issued his summons upon that affidavit, *returnable the next day* at ten o'clock in the forenoon, requiring the relator to show cause at that time, as is usual in cases of tenants holding over without permission.

There was no appearance on behalf of the relator in the said proceedings, except for the special purpose of objecting to the jurisdiction of the justice, and on the 22d of November, 1873, upon proof of service of summons on relator, the justice rendered judgment in favor of the landlord, and issued his above-mentioned warrant to carry the same into effect, and the same was executed on the day of its issue by dispossession of the relator and the putting the landlord into full possession.



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Bowery National Bank v. Mayor of New York.

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*Ely & Smith*, for relator. The affidavit was insufficient and fatally defective. 20 Wend. 103; id. 23; 6 Hill, 317; 1 N. Y. Stats. at Large, 695, § 1. The return day was improperly *fixed*. Laws of 1868, chap. 828.

*Charles L. Halberstadt*, for respondent.

DONOHUE, J. Assuming that the affidavit makes out a case on which the justice might issue his summons, the facts appear to be, that the tenancy expired on the 14th of November. On the 18th of that month, the justice issued a summons returnable on the 19th, and on the return of that summons, showing a service on the 18th, under the objection of the tenant, who appeared only for the purpose of objecting that the summons should have been returnable on the day it was served, or more than one day thereafter, the justice granted his warrant, and the tenant was removed. The tenant brings the case here for review. No argument is filed for the respondent, and we can find no authority for such a summons as that on which the justice acted. The statute gives the right in certain cases to have the summons returnable in less than three days, but when so returnable it must be on the same day. In this case the summons issued cannot be sustained, and the proceedings must fall with it.

DAVIS, P. J., and DANIELS, J., concurred.

*Proceedings reversed.*

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BOWERY NATIONAL BANK v. MAYOR, ETC., OF NEW YORK,  
appellants.

*Contract — condition precedent — certificate of performance.*

A contract for paying a street in the city of New York provided that the contractor should not be entitled to demand or receive payment for work or materials until the work should be fully completed in the manner agreed, and such completion certified by the inspectors employed thereon, and by the water purveyor, or other officer designated by the commissioner of public works; wherefore, the city agreed to pay to the contractor, on the confirmation of the assessment, the sum specified in such agreement. A certificate of the completion of the work was given by the inspector, but none had been given by the water purveyor, nor by any other officer designated by

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the commissioner of public works. Such commissioner, however, had certified that the work had been returned as properly completed, and had been accepted. *Held*, that it was competent for the parties to make these provisions for determining whether or not the contract had been performed, and they having done so, in express terms, the obtaining of both certificates became a condition precedent to any right of recovery by the contractor.

*Held, also*, that the decision of the question of completion having been referred, by the contract, to the inspector and purveyor, it could not afterward be withdrawn and referred to the decision of a court or jury, without showing impossibility of performance, or that the certificate had been unreasonably and in bad faith refused.

*Held, further*, that the certificate of the commissioner of public works himself, that the work had been performed and accepted, was not a sufficient compliance with the terms of the contract.

By the terms of the contract, the money was not payable until the assessment levied should be confirmed. That had not been done, because confirmation had been prevented by injunction. *Held*, that it was no answer to the objection that the money was not yet due for the plaintiff to show the pendency of the injunction.

APPEAL from a judgment entered upon a verdict directed by the court. The facts appear sufficiently in the opinion.

*E. Delafield Smith*, corporation counsel, for appellants.

*Robert H. Strahan*, for respondent.

DAVIS, P. J. The plaintiff sues, as assignee of a contract, for paving One Hundred and Twenty-eighth street, from Second to Sixth avenues. The contract was made between Charles H. Green, president of the Hamar Preserved Wood Pavement Company and the defendant. Among other provisions, the contract provided that the contractor "shall not be entitled to demand or receive payment for any portion of the aforesaid work or materials, until the same shall be fully completed in the manner set forth in this agreement, and each and every one of the stipulations hereinbefore mentioned are complied with, and such completion duly certified by the inspectors employed on the work, and by the water purveyor or other officer designated by the said commissioner of public works; whereupon the parties of the first part will pay, and hereby bind themselves and their successors to pay to the said party of the second part, in cash, on the confirmation of the assessment to be laid for

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said work, the whole of the moneys accruing to him under this agreement." etc.

It was also provided in said agreement, "that nothing herein contained be construed to affect the right hereby reserved of the said commissioner of public works to reject the whole or any portion of the aforesaid work, should the said certificate be found or known to be inconsistent with the terms of this agreement, or otherwise improperly given."

On the trial it appeared that William M. Tweed was commissioner of public works, and, on behalf of the defendants executed the said contract; that a certificate of the completion of the work had been given by the inspector, but that no such certificate had been given by the water purveyor, nor by any other officer designated by the commissioner of public works, and that no assessment laid for such work had been confirmed. It appeared, however, that Mr. Tweed, the commissioner of public works, had certified that the work "has been returned as properly completed, and has been accepted by this department."

It was also shown that the completion and confirmation of the assessment had been restrained by a temporary injunction issued by the court of common pleas, in a suit brought by one Tooker, as plaintiff, against the defendant and various officers of the city.

Upon these facts the defendants moved to dismiss the complaint, on the grounds, first, that no money is yet payable under the contract; and, second, that there is no certificate of the water purveyor as to the acceptance of the work. The court denied the motion and defendants duly excepted.

The court thereupon directed verdict for the plaintiff for \$22,958.63, and defendants duly excepted.

The conditions relied upon by the defendants, on their motion, are very plainly expressed in the contract. It is stipulated that the evidence of the completion of the contract shall be the certificate of the inspector in charge of the work and the water purveyor (a well-known officer of the city), or such other officer as might be designated by the commissioner. No designation of any other officer having been shown to have been made, the requirement of the contract is the certificate of the water purveyor. It was clearly competent for the contracting parties to make these provisions, as to the mode of determining whether or not the contract had been performed according to its stipulations; and, having done so in express

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terms, the obtaining of both certificates became a condition precedent to any right of recovery on the part of the contractor, unless waived or otherwise disposed of. *Smith v. Brady*, 17 N. Y. 173; *Butler v. Tucker*, 24 Wend. 447; *Thomas v. Fleury*, 26 N. Y. 26. The decision of the question of completion having been referred by the contract to the inspector and purveyor, it cannot now be withdrawn and referred to the decision of a court or jury without showing impossibility of performance, or that the certificate has been unreasonably and in bad faith refused. *Butler v. Tucker*, 24 Wend. 447; *United States v. Robeson*, 9 Pet. 319.

No evidence on those subjects was given; but it was shown that Mr. Tweed, the commissioner of public works, had himself certified, as such commissioner, that the work had been performed and accepted. It is claimed that this was a sufficient compliance with the terms of the contract, because the commissioner, being the officer who might, under the contract have designated another officer than the purveyor to make the certificate, had, for that reason, power to perform the act required of such officer himself. But this position cannot be sustained. The power to designate an officer to perform the act by no means includes authority in the designating officer to do it himself. It was the judgment of the water purveyor, or officer to be designated for that special purpose, for which the defendants contracted. It often occurs that power to select officers or persons to perform specific duties is conferred upon a board or officer, but it is seldom true that the authority to select includes also the power to perform the acts to be done by the officer or person chosen. Courts are authorized to appoint commissioners to estimate and assess damages, but it by no means follows that the estimate or assessment can, for that reason, be made by the courts; and so in agreements of arbitration, it frequently occurs that some third person is named to choose an umpire, but the power to choose in that case does not carry to such person the right to be umpire himself.

Besides, Mr. Tweed's duty as commissioner was quite inconsistent with his assumption to perform that which the contract referred to the water purveyor, because, as such commissioner, the law and the contract provide that he shall exercise ultimate supervision so far as, not only as commissioner to determine whether the work is in fact done according to the contract, but to decide whether the certificates required have not been improperly given. To allow him, therefore, to substitute himself for the water purveyor — to perform

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the subordinate duty—is to deprive the defendants of his final supervision and judgment. To allow this practice, would be to open an easy door for a long line of frauds upon the city.

But, by the terms of the contract, if the certificate had been given, the money was not payable till the assessment laid should be confirmed. The assessment had not been confirmed. It was shown that its confirmation had been prevented by the injunction, *pendente lite*, of a court of competent jurisdiction. No proof was given that the suit was collusive, or that the defendants were otherwise connected with it than as litigants whose action was temporarily restrained against their will. Under such circumstances, there is no ground for saying that the suit and injunction were any thing more than incidental embarrassments in the way of the confirmation of the assessment, for which neither party was in fault, and which may as well have been in the contemplation of one as the other when the contract was made. It by no means followed that the assessment would not be confirmed, nor that the injunction would not be removed at the hearing. It was, therefore, no answer to the objection that the money was not yet due, for the plaintiff to show the pendency of the suit and injunction.

The judgment must be reversed and a new trial ordered, with costs to abide the event.

DANIELS and DONOHUE, JJ., concurred.

*Judgment accordingly.*

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MOUNT, executor, etc., v. ELLINGWOOD, appellant.

*Counter-claim — accord and satisfaction.*

In an action upon a bond, the defendant set up, as a counter-claim, an account for professional services rendered the obligee. The plaintiff, in answer to the counter-claim, alleged that the bond was delivered as a full settlement, on a final accounting between the parties. The referee having found that the counter-claim accrued before the accounting took place, *held*, that it was barred by such settlement and the giving of the bond.

THIS action is upon a bond made and delivered by the defendant to Henry Placide, the plaintiff's testator. Defendant sets up a

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counter-claim for services rendered as attorney at law of the testator. To the counter-claim, plaintiff interposed the statute of limitations as a bar, and also made plea that the bond was delivered as a full settlement on a final accounting between the defendant and the testator. The plea of the statute of limitations was not sustained, but the referee found, on a review of the evidence, in favor of plaintiff on the latter point. From the judgment entered on his report, this appeal is taken

*N. B. Sanborn*, for appellant.

*W. Cary Smith*, for respondent.

DAVIS, P. J. The referee found, as a matter of fact, that the counter-claim alleged by defendant accrued before the statement of the account made, prior to and at the execution of the bond, and he held, as a conclusion of law, that the claim "was barred by the accounts and settlement between the parties when the bond was given, and by the giving of the bond." I think the finding and conclusion of the referee were clearly right. The evidence not only justified but required the finding and the judgment should be affirmed.

DANIELS and DONOHUE, JJ., concurred.

*Judgment affirmed.*

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PEOPLE V. SHERWIN, appellant, *et al.*

*Wrongful conversion — title.*

Certain drafts, sent to the State treasurer by county treasurers, in payment of taxes, and being in the State treasury, were wrongfully converted by the defendant, who showed no title in himself. *Held*, that he was a mere wrong-doer, without title; and that the possessory title of the people was sufficient to sustain an action for the conversion of the drafts.

APPEAL from an order of the special term, December 26, 1873, denying defendants' motion to vacate an order of arrest. The action is for the conversion of certain drafts, the property of

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plaintiffs. The order of arrest was made on October 18, 1873. The affidavits, on which it was granted, charge the defendant with having wrongfully collected and received the money, or converted to his own use, three drafts, the property of plaintiffs, as follows: A draft of \$15,000, drawn about the 25th of August, 1873, by the Merchants' National Bank of Poughkeepsie, on the National Bank of the Commonwealth, of the city of New York, to the order of the treasurer of the State of New York, indorsed for the State treasurer by C. H. Phelps, cashier, to Charles Hudson, cashier; a draft of \$20,000, dated September 11, 1873, drawn by the First National Bank of Buffalo on the Fourth National Bank of the city of New York, to the order of R. Porter Lee, teller, by him indorsed to the comptroller of the State; by the latter indorsed to Thomas Raines, treasurer, and then indorsed by Fulton Paul, deputy treasurer, to Charles Hudson, cashier, or order; and a draft for \$20,000, drawn about September 11, 1873, by the Farmers and Mechanics' National Bank of Buffalo, on the Merchants' National Bank of New York, to the order of the comptroller of the State; by him indorsed to the treasurer of the State; and then indorsed by Fulton Paul, deputy treasurer, to the order of Charles Hudson, cashier.

The affidavits state that these were, on certain days, in the State treasury; that the indorsements thereon by Phelps and Paul, respectively, were without authority; that Hudson was the cashier of the defendant Sherwin, who had wrongfully received the same from Phelps, etc.

The attorney-general, for the purposes of the motion to vacate the order of arrest, admitted, by his stipulation, that these drafts were procured and transmitted to the State treasurer by county treasurers, in order to pay State taxes due from them to the State.

*Saloman & Burke*, for appellant. The State had no title to these drafts, and no authority to sue for their conversion.

It was no part of the duties of the State treasurer to accept these drafts, and collect them for the county treasurers, in order to place the money into the State treasury. The duty of paying that money into the State treasury devolved upon the county treasurers, and the acts of the State treasurer in that respect, while not unlawful, were not official, and did not change the title or ownership of the drafts from the county treasurers to the State.

Such drafts, not being expressly authorized by law, must be held

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to be a mere private device of the county treasurers; proper enough, if through them the money actually reaches the State treasury, but which cannot and do not themselves become the property of the State, but remain at the risk, and consequently the property of the county treasurers, or their counties, until the money is paid thereon into the State treasury or depository. 1 R. S. 177, §§ 1-12, chapter 427, Laws of 1855, necessarily repeals chapter 44, Laws of 1843.

*Francis C. Barlow*, attorney-general, for the people.

DONOHUE, J. This is an appeal from an order denying a motion to discharge from arrest. The facts on which the order of arrest was granted are, that the defendant converted certain drafts in the hands of the agents of the State to his own use. There is no question raised but that the drafts had been sent to and received by the State officers in payment of taxes. The defendant attempts to make no title in himself.

Without discussing the mode in which taxes should be paid, and denying the State the use of the ordinary commercial mode of receiving payment of its debts, it is enough to say that the defendant stands in no position to question the plaintiff's title. He is a mere wrong-doer, without title, and the possessory title of the plaintiff is sufficient to sustain this action. 1 Tur. & Gran. 150; 1 Exch. 70; 5 Ellis & Blackb. 802. The order appealed from should be affirmed.

DAVIS, P. J., and DANIELS, J., concurred.

*Order affirmed.*

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DELANY V. DELANY, appellant.

*Judgment — opening upon condition — vacating.*

The court has the right to impose it, as a condition of opening a default, that there shall be a reference and a speedy trial. If the defendant does not choose to take the order, with the condition, he is at liberty to decline its benefits, and allow the judgment to stand; or, he may appeal from that part of the order imposing the condition. But, after proceeding upon the order, and after a judgment has been entered against him upon the referee's report, he cannot move to set aside the judgment as irregular.



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APPEAL from an order of special term, denying defendant's motion to vacate and set aside the order of reference in this action, the judgment thereon and the subsequent proceedings, as illegal and void, on the ground of want of jurisdiction and irregularities. This action was for a limited divorce, and the complaint alleges abandonment and cruel treatment as the grounds for the decree asked for. Judgment was taken against defendant by default, March 30, 1870. On April 6, 1870, Judge BRADY made an order that the default be opened, the judgment to stand as security, and that the cause be referred. The trial before the referee then proceeded till October 5, 1871, when his report was filed and a judgment entered thereon for a limited divorce. Defendant objects to the order of reference, on the ground that the court had no jurisdiction to grant a reference without consent, and also for alleged irregularities in the various proceedings. There is a conflict as to whether the order opening the default was duly consented to by defendant's attorney. Judge INGRAHAM, in making the order appealed from, delivered the following opinion: "The judgment was opened by Justice BRADY on condition that the case should go to a reference, and he so ordered. If the defendant objected to the reference, he should have appealed from the order."

*C. C. Egan*, for appellant, cited 48 Barb. 566; 3 Rob. 642; 40 N. Y. 511; 18 L. J. Rep. 290, C. P.; 7 How. 259; 37 id. 36; 3 Abb. 167; 53 Barb. 488. Appearance before the referee and trying the cause does not operate as a waiver of the objection. 3 Barb. 232; 40 N. Y. 512; 4 Rob. 665; 35 How. 155. The objection may be taken advantage of at any time. 15 Johns. 21; 19 id. 162; 3 Cow. 372; 6 How. 163; 6 Barb. 613; 41 N. Y. 275. The condition imposed, of a reference, on opening the default, was improper. 5 Rob. 612; 26 How. 187.

*Field & Shearman*, for respondents.

PER CURIAM. For the reasons assigned by the court at special term, we are of opinion that the order appealed from should be affirmed. The application to open the default was to the favor, and not a matter of strict right. The court had a right to impose the condition of an immediate reference and speedy trial; and the defendant, if he did not choose to take the order with the condition, was

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at liberty to decline its benefits, and allow the judgment on the trial by Judge CARDOZO to stand; or, as suggested by the court below, if the condition was improperly imposed, his remedy was by appeal from that part of the order. A reversal of the order of reference *in toto* would simply leave the former judgment in full force.

*Order affirmed.*

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BERGOLD v. PUCHTA, appellant.

*Slander.*

These words: "He is no doctor; he bought his diploma for \$50," spoken of a person in his professional character, *held* actionable in themselves.

APPEAL from an order made by Mr. Justice BARRETT, denying defendant's motion to set aside an order of arrest. The order was granted by Mr. Justice DANIELS, in an action for slander. The affidavit upon which it was granted sets out the slanderous words as having been uttered in the presence of one Weineise, as follows, viz.: "He [meaning the plaintiff] is no doctor; he bought his diploma for \$50."

No special damages are alleged.

The defendant denies having uttered these or any defamatory words about the plaintiff.

The plaintiff, to support his affidavit, introduced other affidavits tending to show other defamatory words uttered in the presence of different persons from those set out in the first affidavit.

*Henry Wehle*, for appellant. An order of arrest should not be granted in an action of slander, unless defendant is a transitory person or about to depart the State. 15 Abb. 229; 6 Abb. N. S. 23. The affidavit does not set out a cause of action for slander. 42 Barb. 326; 17 N. Y. 54; 2 Barb. 630. Plaintiff must aver and prove special damage. 5 Johns. 188; 18 id. 124; id. 273; 17 id. 217; 15 Wend. 327; 24 id. 354; 3 Hill, 21; id. 139; 4 Barb. 504; 5 How. Pr. 171; 2 E. D. Smith, 388. It was incompetent for plaintiff to produce additional affidavits, charging other defamatory expressions, to support the one alleged in the moving affidavit. 3 How. 265;

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12 id. 197. Plaintiff should show reason why he cannot produce the affidavit of the party within whose personal knowledge the fact is. 12 Abb. 265; 21 How. 112; 33 Barb. 520.

*E. D. Culver*, for respondent.

DANIELS, J. The affidavits read upon the motion warrant the conclusion that the defendant uttered and published of the plaintiff, as a physician, the words that "he is no doctor; he bought his diploma for \$50;" and the action is brought to recover damages for the uttering and publication of such words. These words contain an imputation of ignorance and want of skill, and having been spoken of the plaintiff in his professional character, they are, within the well-settled rule, actionable in themselves. That they were spoken of the plaintiff in his professional character is clearly shown by the words themselves; and, where that appears to be the fact, an action of slander may be maintained. It "is well-settled law that words published of a physician falsely imputing to him general ignorance or want of skill in his profession, are actionable in themselves, on the ground of presumed damage." *Secor v. Harris*, 18 Barb. 425, 426; *Fitzgerald v. Redfield*, 51 id. 484. The order should be affirmed, with costs.

DAVIS, P. J., and DONOHUE, J., concurred.

*Order affirmed.*

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PEOPLE *ex rel.* TUTTLE V. WALTON.

*Summary proceedings. Set-off.*

The statutes relating to the allowance of set-off and counter-claims have no application to proceedings under the statute for the removal of tenants for non-payment of rent. They are solely applicable to actions, and to such actions only as are mentioned in the statutes.

Accordingly where it was shown that a tenant had tendered one-half of the rent due and had a claim against the landlord for an amount equal to the balance, *held*, that such tender and claim did not constitute a legal answer to the affidavit of the landlord that the rent was not paid.

CERTIORARI to review proceedings had before a district court justice under the statute for the summary removal of a tenant for non-payment of rent.

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The facts appear sufficiently in the opinion.

*Thomas Stevenson*, for relator.

No appearance for respondent.

DANIELS, J. The affidavit presented to the justice, on behalf of the landlord, in the proceedings taken before him for the removal of his tenant, for the non-payment of rent, contained a statement of all the facts required to bring the case within the statute, and the person who made it swore positively to the fact that he was the agent of the landlord. 2 R. S. 512 (3 R. S. 5th ed. 836), §§ 28, 29. It was, within the construction of the statute adopted by the courts, sufficient to give the justice jurisdiction of the proceedings. *Cunningham v. Goelet*, 4 Denio, 71. Upon the affidavit the justice issued his summons, in the form prescribed, which was served upon the tenant and under tenants named in the proceedings, and upon its return day the tenant appeared and filed his own affidavit, simply controverting the fact that the rent claimed was due; and that was denied because the tenant had tendered one-half the rent before the proceedings were taken, and had an off-set to the other half for improvements upon the premises, which the landlord had agreed to pay, a claim of \$150 for the use of the premises, which the landlord had also agreed to pay, and for certain services of the tenant and his clerks. The justice held that this did not contain a legal answer to the application made by the landlord, and in that he was clearly right, for the affidavit, so far as it depended upon the off-set, in substance admitted that the rent was due and unpaid. As long as the demands mentioned in the tenant's affidavit were unapplied to the rent due, both they and the rent were entirely separate and independent demands. The statutes relating to the allowance of off-sets and counter-claims have no application to the proceedings provided for the removal of tenants for the non-payment of rent. They are solely applicable to actions, and to such actions only as are mentioned in the statutes. 2 R. S. 234 (3 R. S. 5th ed. 434, 435), § 48, subd. 5; id. 354, § 18 (5th ed. 634, 635, § 12), subd. 5; Code, § 150.

The determination of the justice was correct, and the proceedings should be affirmed, with costs.

DAVIS, P. J., and DONOHUE, J., concurred.

*Proceedings affirmed.*

## HOGAN, plaintiff in error, v. PEOPLE.

*Election law—offenses against. Evidence.*

On the trial of an indictment, under the statute making it a felony "for any person other than an inspector of elections to knowingly and willfully put, or cause to be put, ballots into a ballot-box" at certain elections, it was admitted that the prisoner was not an inspector, and that he did put ballots into a ballot-box at an election. *Held*, that evidence to show that the prisoner was, at the time, acting as inspector instead of C., who had been appointed, and who had, by power of attorney, appointed the prisoner to act in his place, was properly rejected.

ERROR to review a conviction of the plaintiff in error. The facts appear in the opinion.

*B. K. Phelps*, district attorney, for the people.

DONOHUE, J. The plaintiff in error was indicted under a statute of the State making it a felony "for any person other than an inspector of elections to knowingly and willfully put, or cause to be put, ballots into a ballot-box at elections provided for in the act."

That the plaintiff in error was not an inspector is admitted, as, also, that he did put ballots into a ballot-box at an election held under the provisions of the law alleged to be violated.

On this simple statement of the case the counsel for Hogan does not argue that there is any defense; but in the court below he sought to introduce testimony to show that Hogan was acting as inspector, instead of one Conklin, who had been appointed, and who had, by power of attorney, appointed Hogan to act in his place; and on the refusal of the judge before whom the case was tried to admit the evidence, he excepted, and now asks this court to review that ruling.

We think the evidence was properly rejected. The evidence does not tend to any point but to show that some one who was wrong in his advice told Hogan to act. He knew he was not an inspector, and took some one's statement that Conklin had power to appoint. To open the door to the defense set up here would be a dangerous precedent. If Hogan would be justified in relying on a lawyer's advice other parties would be equally so, and it would be difficult to see how the mischief could be remedied, and the safety sought by the statute to guard elections would be at an end. How far the

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defendant's good faith and want of bad motive ought to screen him must be left to the discretion of the court, who will pass judgment, and the power of the executive. The offense that the law denounced is clearly made out.

The judgment should be affirmed.

DAVIS, P. J., and DANIELS, J., concurred.

*Conviction affirmed.*

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DAVENPORT, appellant, v. MAYOR, ETC., OF NEW YORK.

*New York city. Municipal officer accepting federal office.*

Plaintiff, while holding the office of counsel to the health department of the city of New York, accepted and held the office of chief supervisor of elections, under the act of congress passed February 28, 1871. *Held*, that under the provision of Laws of 1873, chap. 835, § 114, he thereby vacated the former office.

APPEAL from a judgment in favor of the defendants upon a verdict directed by the court.

The plaintiff sued to recover his salary as counsel to the health department of the city of New York, from the 30th of April, 1873, to July 8, 1873.

Upon the trial it was admitted that the plaintiff during the entire period named in the complaint was chief supervisor of elections in and for the southern district in the second circuit of the State of New York, appointed pursuant to the act of congress passed February 28, 1871.

Thereupon the court directed a verdict for the defendant, to which direction the plaintiff excepted.

From the judgment entered on the verdict the plaintiff appealed to this court. Other material facts appear in the opinion.

*Robert H. Strahan*, for appellant. The act of congress does not make a new office, but simply imposes new duties upon a designated circuit court commissioner. Section 7, act of congress, February 28, 1871; § 1, *id.* June 10, 1870. The office can only be held by a commissioner for taking bail; one of the excepted classes.

*E. Delafield Smith*, for respondent, cited § 114 of charter of New York city, Laws of 1873, chap. 335.

DONOHUE, J. The appellant was appointed January 15th, 1873, counsel to the health department, of New York city, at a salary of \$5,000, payable out of the city treasury. He claims that he continued to act as such counsel until the 8th of July, 1873, and that no salary has been paid to him as such counsel for services since April 30th, 1873.

No question is made in the answer, except that, by § 114 of the act of 1873, chap. 335, it is provided, that "Any person holding office, whether by election or appointment, who shall, during the term, accept or retain any other civil office of honor, trust or emolument under the government of the United States, except commissioner for the taking of bail or register of any court, \* \* \* shall be deemed thereby to have vacated any office held by him under the city government;" and that, while such provision was in full force, the plaintiff accepted and held the office, and now holds the office, of chief supervisor of elections in and for the southern district of New York, under act of congress of February 28, 1871, and that he thereby vacated his office of counsel to the health department. The evident object and intent of the provision of the charter cited was to have the entire service of all of its officers and to prevent abuses which had grown up in consequence of a divided duty, which interfered with the performance of their duty by city officials. In carrying out this intent, the charter made the sweeping provision it does, its framers being unwilling to open the door to any exceptions. The judge before whom the case was tried held that the plaintiff came within the prohibition of the statute, and ordered judgment for the defendants, and the plaintiff appealed. The only ground of error alleged is that the plaintiff is a commissioner excepted by the act, and that he performs his duties as chief supervisor as such commissioner. In this, we think, he is mistaken. The office of chief supervisor is not one that a commissioner can exercise without appointment; he does not, in common with other commissioners, exercise the powers, but when congress passed the act they wisely determined to restrict the privilege of appointment to a particular class, and it might with equal justice be said, if the plaintiff is right, a judge elected or appointed holds no office other than that of attorney or counsellor, because he must be selected from

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a particular class, namely, counsellor at law. The same might be said of all offices, the appointee to which must be from a profession. The act is clear, its intent is plain, and the office which the plaintiff accepted and retained, "chief supervisor," not being excepted by the charter, the plaintiff must be deemed to have vacated the office for which he asks the salary. The court below was right, and the judgment should be affirmed.

*Judgment affirmed.*

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INNES v. PURCELL, appellant, et al.

*Foreclosure—referee's fees. Appealable order.*

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An order of the special term made on a summary application after judgment, allowed \$100 to a referee appointed to sell under a foreclosure judgment. *Held*, that it charged the owner of the equity of redemption with a greater sum than was lawful, and therefore affected a substantial right and was appealable.

*Held*, also, that a referee appointed to sell in a foreclosure action is entitled only to the same amount allowed by law to a sheriff for the performance of a similar duty.

APPEALS from two orders, one in the action above entitled, allowing the referee \$100 for his services, the other in five other actions between the same parties, denying a motion to remove the same referee from the last-mentioned actions, on account of his charge of \$100 in the one first mentioned.

Said actions were brought to foreclose mortgages. The referee was appointed to advertise and sell the property pursuant to the directions of the court. He was appointed in the action first mentioned on the 17th day of July, 1873. His bill for services in such action was rendered on or about the 1st day of September, 1873.

He was appointed referee in the five other actions referred to on the 2d day of September, 1873.

*Arnoux, Ritch & Woodford*, for appellant.

*William Vennill*, for respondent.

*A. P. Ketchum*, for referee.



DANIELS, J. There seems to be no reason for dissenting from the disposition made of the motion to dismiss the referee by the special term. No good reason existed for his removal, and the motion on that account was very properly denied. It is not, therefore, necessary to examine the objection made that the order is not appealable.

The other order, making the allowance of the sum of \$100 to the referee appointed to make the sale under the foreclosure judgment, stands upon an entirely different principle, for it charges the owner of the equity of redemption with the payment of a definite sum of money which, it is objected, is greater than he or his property can be lawfully charged with. Such an order is appealable when made in a summary application after judgment as this was, for it affects a substantial right. Code, § 349, sub. 5; *People v. N. Y. C. R. R. Co.*, 29 N. Y. 418, 422.

The point is, therefore, before this court for decision, whether the law will sanction the allowance to the referee appointed to carry the judgment of foreclosure into effect by a sale, which is contained in the order. No provision for making it seems to be contained in the Code of Procedure. The sections which that system contain providing for allowances relate entirely to such as may be made by the way of additional costs to be allowed on the recovery of judgment. And the amount allowed becomes a portion of the costs afterward inserted in the judgment, except in foreclosure cases where a sale is ordered for subsequently accruing installments of the mortgage debt, and cases in which allowances are provided for. When they are settled before judgment (Code, §§ 308, 309) they are to be allowed, by the express language made use of on the recovery of judgment, by way of additional indemnity to the party, and are entirely unadapted to the proceedings taken after judgment, for the purpose of carrying it into effect. For the expenses of such proceedings some other statutory authority must be found. It has always been the policy of the law to prescribe and fix the compensation which may be demanded for the performance of legal duties by public officers. And where no provision has been made, either directly or indirectly, no fees can lawfully be demanded. Costs and fees are recoverable by virtue of statutory authority, and where no such authority exists, no claim for their recovery can be strictly maintained. *Downing v. Marshall*, 37 N. Y. 380.

Before the adoption of the constitution of 1846, and the system

of practice devised by the Code of Procedure, mortgages were foreclosed by action, only in the court of chancery. And under the decree recovered, the sale was made by one of the masters of the court. The execution of the decree, by a sale of the mortgaged premises, was uniformly referred to that officer. 1 Barb. Ch. Pr. 525.

And for his services in the performance of that, as well as the other duties enjoined upon him, the statutes carefully prescribed and specified the fees he should receive. As they were declared by the Revised Statutes, which continued in full force until they were modified by the act of 1840, he was entitled to fifty cents for drawing the advertisement or notice of sale, one dollar for attending and adjourning the sale, five dollars for preparing and executing a deed to the purchaser, and commissions not exceeding the sum of twenty dollars to be allowed by the chancellor after notice given to the party to be charged with them. 2 R. S. (Edm. ed.) 650. Besides these fees the master was allowed his expenses and disbursements. With that addition, the master's compensation for the services performed by him in executing the decree and consummating the sale was confined to these items, and they in the aggregate amounted to much less than the allowance made by the order appealed from.

By the act of 1840, which was passed to reduce the expenses attending the foreclosure of mortgages, these fees were reduced in cases where the bill for the foreclosure was taken as confessed, or when the answer served did not deny any material matter set forth in the bill, or the right of a complainant to a decree of foreclosure and sale of the mortgaged premises and payment of his debt, and when no plea or demurrer was served to the bill of complaint. In that class of cases, the master's fees for services performed in the execution of the decree were fixed at the sum of fifty cents for advertising the sale, exclusive of the expense of publication; attending the sale and making a report of it, the sum of two dollars, and for the deed to the purchaser, the sum of one dollar. Laws of 1840, chap. 342. But in construing the provisions of this act, the chancellor held, that the power to allow the commissions provided for by the Revised Statutes, not exceeding the sum of twenty dollars, was not taken away. *Delavan v. Payn*, 8 Paige, 459.

The law was in that condition when the new system of practice arising under the changes resulting from the adoption of the constitution of 1846 went into effect. By that instrument, the office of

master in chancery, as well as the court itself, was abolished, and decrees which, before that time, were required to be executed by the master, after that were necessarily committed to the functions of another officer. To meet the necessities of the changes made, the judiciary act of 1847 was enacted, by which, among other things, it was enacted that, after the first Monday of July of that year, sheriffs should sell any lands in their respective counties ordered to be sold by decree of any court of record in this State, and give conveyances thereof in the same manner and with like effect as was then done by a master in chancery, and for that service, it was provided further, that, in addition to his disbursements, he should be entitled to receive therefor the same fees as upon sales by virtue of an execution, but that the same should in no case exceed ten dollars. 3 R. S. (5th ed.) 261, § 49. This provision was made to take effect on that day because that was the time fixed by the constitution when the office of master in chancery ceased to exist. Const., art. 14, § 8; 3 R. S. (5th ed.) 73. While this act limits the fees to the amount of ten dollars, it may well be doubted whether the restriction to that amount excluded the right to commissions previously provided for by the Revised Statutes; for the restriction of the fees would not necessarily exclude the right to the commissions allowed to be awarded, in the discretion of the court, to an amount not exceeding \$20. The chancellor held that a somewhat similar provision contained in the act of 1840, by which it was enacted that no other fees whatever than those prescribed by that act should be taxed or decreed against the defendant, or demanded or received from him, did not have the effect of excluding the power to award the commissions. *Delavan v. Payn*, 8 Paige, 459. That decision is an authority for the continued exercise of the same power, unless the circumstance that the decrees in equity were committed by the act of 1847 to the powers of another and distinct class of officers, should be held sufficient to render the provision made for the compensation of the master for a like service inapplicable to them.

Under the act of 1847, the execution of decrees in equity under which real estate was to be sold was regarded as being exclusively given to the sheriffs of the different counties of the State. In that understanding the rules of the supreme court were adopted in July, 1847. And they provided for the manner in which the duty so conferred on the sheriffs should be discharged. Rule 92 of Equity Rules.

The law upon this subject appears to have remained unchanged

until the Code was amended in 1851, when it was provided that real estate adjudged to be sold must be sold by the sheriff of the county, or by a referee appointed by the court for that purpose, and thereupon the sheriff or referee must execute a conveyance which shall be effectual to pass the rights and interests of the parties adjudged to be sold. Laws of 1851, appendix 95, § 287. This provision has continued to be since that time a portion of that section of the Code. At the time when this change was made by which the court was empowered to appoint a referee to sell real estate when adjudged to be sold by courts of record, no provision was in terms made for his fees and expenses in discharging these duties, and none has since then been enacted upon that subject.

In 1869, an act was passed by which it was designed to restore the exclusive power of the sheriff in the county of New York, to make sales of real estate under judgments of the courts, and to increase the amount of fees for his services beyond that specified by the judiciary act in 1847. Laws of 1869, chap. 569. But this was held to be ineffectual because the act failed to conform to the provision of the constitution relating to the title which should be affixed to local acts. *Gaskin v. Meek*, 42 N. Y. 186. The specific compensation prescribed in 1847 for the sale of real property under the judgment or decree of a court of record appears, therefore, to remain unchanged in all cases where the sale may be made by the sheriff of the county of New York.

When the power was conferred under which a referee could be appointed to make the sale instead of the sheriff, no provision was made declaring what fees he should be entitled to receive for the performance of the service. Before that time, for services they were previously empowered to perform, the fees of referees were prescribed by law, but when the statutes were enacted declaring what their fees should be, they simply had judicial duties to perform, including no duties whatever of the description provided for by the amendment made to the Code in 1851, under which they could be empowered to execute judgments for the sale of real estate. The fees for the performance of their judicial duties were first fixed at two dollars per day for the service performed, and one dollar for expenses, and afterward changed in general terms to the amount of three dollars for each day employed in the business of the reference. 2 R. S. 662, § 36; Code, § 314. Since 1848 this provision has remained the same, and as the authority to sell lands

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under the judgment or decree of a court of record had not then been conferred on referees, it would seem to follow very directly that this provision could not have been intended or designed as a compensation for that service. It was not and could not have been within the intent of the legislature in enacting this provision, and for that reason, although the service may now be within its literal reading, still it is not to be rewarded by that compensation. The rule upon this subject is that the intent of the enacting authority of the law is to be maintained in its construction. And for that reason a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers. *Holmes v. Carley*, 31 N. Y. 289, 290.

If the services to be performed by a referee, under the judgment of a court, providing for the sale of real estate, were to be held to be within the provision of the Code regulating the fees of referees, then the inconsistency would be presented, that for the same official service two different rates of compensation would be provided — one for the sheriff, the other for the referee. And there is no good reason for supposing that to have been the design of the legislature. On the other hand, it is much more reasonable to suppose that the measure of compensation for the same services, although performed by different officers, was intended to be uniform.

The services are precisely the same whether performed by the sheriff or a referee. The latter is merely a substitute for the former. He is so treated by the provision of the law giving him power to sell, and the rule relating to the performance of his duties. Code, § 287; rule 73. They involve the execution of the judgment, and are simply ministerial in their nature. And if the referee was designed to be allowed fees for the performance of these duties, as he undoubtedly was, as the service required is precisely that for which fees are allowed to the sheriff, it must have been intended that his compensation should be adjusted by the same standard. His right to those fees, though nowhere expressed, is within the equity of the statute providing them as a compensation for the services his duty under the judgment required him to perform.

In a somewhat analogous instance, where the legislature provided commissions for executors and administrators, by way of compensation for the performance of their duties, guardians and trustees,

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though not named in the act, were held to be within the equity of its provisions, and for that reason afterward allowed the same compensation in cases where no distinctive provision was made in their favor. *Meacham v. Starnes*, 9 Paige, 398, 402; *Wagstaff v. Lowerre*, 23 Barb. 209, 224, 225. The case of a referee performing the duties otherwise devolving upon the sheriff is within the spirit of this principle. The identity of the service, the improbability that the legislature designed to compensate one officer by one rate of fees and another by one altogether different, for doing the same thing, the omission of the legislature to make any specific provision upon the subject, together with the circumstances that the per diem allowance for referees was enacted when they were required to perform only judicial duties, combine to sustain the conclusion that it must have been intended, when, what previously were simply the duties of the sheriff, by way of executing judgments, were allowed to be committed to the performance of referees, that the latter should have the same fees for their services and no others.

There is no reason for holding the services of the referee to be within the equity of the statute providing the compensation of executors and administrators. The duties to be performed are not of the same description. They simply require a sale of real property and the immediate disposal of the proceeds, as directed by the rules and practice of the court. They are merely ministerial, allowing no discretion unless it be in the disposition of applications made for adjournment of the sale. No propriety can exist for holding them to be within the equity of that statute, while another is in force expressly providing the compensation to be made for the duties to be performed, when they may be done by a different officer.

The allowance made to the referee was wrong, and the order making it should be reversed, and his fees should be taxed at the same rate as the statute allows the sheriff for the performance of the same services.

DAVIS, P. J., and DONOHUE, J., concurred.

*Ordered accordingly.*

## BURLING, appellant, v. KING.

*Attorney and client — agreements between — when equity will not enforce.*

Defendant agreed in writing to give plaintiff, who was her attorney in certain actions against her husband, one-third of the amount realized from such actions for his services and disbursements for counsel, etc. It appeared that plaintiff instituted the actions for the purpose of harassing the husband into a settlement, which purpose he accomplished by vexatious and annoying legal proceedings. Previous to making the agreement defendant had paid plaintiff for his services, etc., \$625, and under a decree entered upon the settlement, \$1,500 was allowed to the counsel employed by plaintiff, which was paid by the husband. *Held*, that equity would not interfere to enforce the agreement made by defendant, but would leave plaintiff to his action at law.

MOTION by appellant for the re-argument of an appeal.

The action was brought to compel the specific performance of a written agreement made by the defendant in which, after reciting that she had *two* actions, in which she was plaintiff, pending in the supreme court against Louis King (her husband) — one action for the recovery of certain real estate in the city of New York, and the other action for a divorce from her husband — and that the plaintiff in this action had incurred responsibility in the employment of additional counsel and to others in the defendant's behalf in those two actions, in consideration of services rendered and to be rendered by the plaintiff, and to enable him to discharge such responsibilities, the defendant agreed that the plaintiff should retain and have the full one-third of all property or properties, money or moneys recovered in said actions or either of them, and also to convey to the plaintiff, on his request, the said one-third, if a conveyance was necessary to possess him of said one-third of said moneys, property or properties.

The trial was had before Mr. Justice SUTHERLAND, at special term, who found that the plaintiff was not entitled to the specific equitable relief asked for, or any equitable relief, and that his complaint should be dismissed. Plaintiff's appeal from the judgment entered thereon came on to be heard at the May, 1873, general term of this court, when the judgment of the special term, so far as specific performance was refused, was affirmed, and in other respects reversed, and a special issue directed to be tried at

the circuit as to whether, on a *quantum meruit*, the plaintiff was entitled to further compensation. The opinion of the general term therein is given in 8 Alb. Law Jour. 301.

*Ira Shaffer*, for appellant.

*William A. Cowsen*, for respondent. The agreement should not be sustained. It is against public policy. *Crawford v. Russell*, 62 Barb. 92; *Rose v. Truax*, 21 id. 361, 379. There was no mutuality in it. *Ogden v. Jackson*, 1 Johns. 370; *German v. Machin*, 6 Paige, 288. The husband was alone liable for the services in the divorce suit, and the whole agreement falls. *Davis v. Morris*, 36 N. Y. 573; also cited *Clarke v. Rochester, etc., R. R. Co.*, 18 Barb. 350; *Slocum v. Closson*, 1 How. App. Cas. 705; *Watt v. Rogers*, 2 Abb. Pr. 261.

DAVIS, P. J. It is well settled that a bill in equity for the specific performance of a contract is an application to the sound discretion of the court, which withholds or grants relief according to the circumstances of each particular case. As was well said by SUTHERLAND, J., in the court below, the agreement sought to be enforced "must be certain in its terms, mutual in its character, fair and just, and founded on an adequate consideration, and be in its nature and circumstances unobjectionable to a court of equity."

The agreement in this case was made between attorney and client, stipulating in behalf of the attorney for a large share of the property in litigation, or to become the subject of litigation, as a compensation for services rendered or to be rendered, and for expenses in the employment of additional counsel "and others" in behalf of the plaintiff. It has been held that such agreements can be lawfully made under section 303 of the Code. *Benedict v. Stuart*, 23 Barb. 420. But the rule is still in full force that such agreements are regarded with suspicion by the courts, and in case the meaning of the instrument is not transparently obvious the most favorable construction is to be put upon it in favor of the client. *Hitchins v. Van Brunt*, 38 N. Y. 335; *Brotherson v. Consalus*, 26 How. 213; *Fish v. Fish*, 39 Barb. 513.

Agreements between attorney and client of the kind sought to be specifically enforced in this case, when brought before a court of equity for its consideration, are subject to the well-settled principles that enjoin upon the court carefully to scrutinize the dealings and



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contracts between attorney and client, and to protect the latter against every attempt of the former to gain any undue advantage over his client. All presumptions are in favor of the client, and there must be clear proof, not only of the due execution of the instrument, but also of its integrity and entire fairness, outside the paper itself. *Brock v. Barnes*, 40 Barb. 521; *Nesbit v. Lockman*, 34 N. Y. 167, and see opinion of BACON, J., in *Hitchins v. Van Brunt*, 38 N. Y. 342; Story's Eq. Juris., §§ 308-324; *Ford v. Harrington*, 16 N. Y. 285; *Comstock v. Comstock*, 57 Barb. 453. It is, I think, to be regretted that the courts, in construing section 303 of the Code, did not discriminate between contracts properly stipulating a measure of compensation for professional services, and those in which attorneys secure to themselves an interest virtually as owners in the subject-matter of the litigation. The construction which permits such ownership tends to promote litigation in some of its worst forms, and to degrade the legal profession by involving its members, who allow themselves to make such contracts, in practices which the common law, and formerly the statutes of this State, denounced and punished as criminal, under the general designation of champerty and maintenance. It is quite easy to agree upon the compensation of an attorney without measuring it by a share, or any participation in the property recovered. Although such contracts are probably enforceable at law, I think it yet remains to be seen whether courts sitting in equity will classify them with the kind to which it applies its discretionary power to compel specific performance.

The learned justice who tried this case found as a fact that the agreement of plaintiff was, on his part, with intent to prosecute and carry on said actions with the aid of counsel to be employed by him with a view of harassing the defendant in them into some settlement or result similar to that which actually took place. The evidence quite justified the finding, for it shows that while the present plaintiff brought the heavy artillery of able counsel into the case and another person as attorney of record, he devoted himself to the guerilla tactics of hanging upon the flanks of the enemy to annoy him with affidavits and orders, injunctions, receivers, motions and stays, till he was glad to surrender at discretion. The counsel of Mr. King, testifying on behalf of the present plaintiff, says: "I was never more harassed in a litigation in my life than I was by Mr. Burling's services in that case. \* \* \* I would come

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to my office in the morning and find a bundle of affidavits and notices of motion. I would do my best to reply to them, but before I did it I would find another bundle of affidavits. He was always making motions to dismiss every thing I did. I took an appeal from an order, and then I had a bundle of affidavits to dismiss that. I don't know how many affidavits, but, seemingly from Germans, from a great number of persons, an infinite number of affidavits on every conceivable branch of the case." And again, after describing the injunctions and receivership, he says: "I never was more harassed with the efforts of an attorney. \* \* \* I was exceedingly glad to settle."

The plaintiff himself describes the character of some portion of his work, showing that it was not limited to the bar of the court. "There has been," he says, on his direct examination, "a great deal of money spent in that suit. \* \* \* I would rather not go into particulars about the matter; there were matters that money had to be paid for." And, on cross-examination, when pressed to account for the alleged disbursement of the money paid him by Mrs. King, "You are now getting beyond my recollection; I kept no account of that matter at all; I was continually going to lager beer saloons and to all sorts of places where money had to be spent." And when closer pressed, he says: "I object to giving these details, for the reason that a great part of this business is confidential entirely, with all these parties." When asked by his counsel to state, generally, how much time was consumed in procuring the affidavits and papers up to the time of the injunction and motion to vacate, the plaintiff answered: "I cannot say, further than that my time was almost continually occupied in obtaining the affidavits and papers in that printed book; it took almost the whole of my time during that period; there were a great many papers and affidavits drawn that were not used—affidavits taken from parties to prevent them from being afterward used against us; there was a great pile of them."

It seems to me impossible to conceive a better illustration of the injurious effect of such agreements between attorney and client than the disclosures of the plaintiff himself present, nor stronger reasons why a court of equity should refuse to enforce a contract which finds its consideration in the services he described and proved.

It is true the learned judge who pronounced the opinion at general term fell into an error of fact as to the time when Mrs. King

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paid to plaintiff the \$625, which he admitted he had received. He supposed it was after the making of the contract when in fact it was before; and upon this error he based a strong argument in favor of affirming the judgment, but the court below fell into no such error; and omitting all that was said on that subject by the learned judge in his opinion, reasons quite abundant for affirmance still remain.

The court below justly regarded the payment of the \$1,500 counsel fee on the settlement as a fact strongly indicating the impropriety of a specific performance. It is true, the counsel employed with sagacious prudence, had that sum made payable by the decree directly to himself, but he testified himself that he was not employed by Mrs. King but by the present plaintiff, and looked to him alone for his compensation. He was, therefore, Burling's counsel and agent, and what he did must be regarded as Burling's act; and it appears that it was approved by him. If the contract meant any thing, it meant that the plaintiff should pay all the expenses of counsel; whatever was got from the other side for that purpose belonged justly and equitably to Mrs. King, yet with that sum virtually in plaintiff's pocket (for it relieved him *pro tanto* from his liability to his counsel), he asks a court of equity still to compel the conveyance to himself of one-third of the real estate which was conveyed to Mrs. King by her husband on the settlement. The refusal of Justice SUTHERLAND to do this seems to me to have been altogether right. He turned the plaintiff over to his remedy (if any) at law. The court at general term have dealt more favorably with him in allowing him to go to a jury with the question whether he has not already been adequately paid.

I think the plaintiff has no right to complain of this result; and the order appealed from ought to be affirmed.

DANIELS and DONOHUE, JJ., concurred.

*Motion denied.*

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Brink v. Republic Fire Insurance Co.

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BRINK *et al.*, appellants, v. REPUBLIC FIRE INSURANCE COMPANY.

*Reference—when compulsory not authorized. Account. Jury trial—waiver of right to. Power of court on appeal.*

In an action upon a policy of insurance upon a single stock of goods, it appeared that such stock consisted of fifty-one items. *Held*, that the demand of the insured did not constitute an account such as to authorize a compulsory reference.

*Held*, also (BARRETT, J., *dissenting*), that by appearing and proceeding to trial under a compulsory order of reference, the party not consenting to the order did not waive his right to a jury trial.

Plaintiff moved to vacate an order of reference upon the ground that the case had been finally submitted to the referee, and he had failed to make his report within the time limited by law. By the opposing affidavits and papers it appeared that the case had not been finally submitted and the motion was denied. Afterward plaintiff obtained an order to show cause why the same relief first applied for should not be granted. From an order denying plaintiff's second motion an appeal was taken. *Held* (BARRETT, J., *dissenting*), that the order of reference could be vacated upon the ground that the case was one in which a compulsory reference was not authorized, notwithstanding plaintiff did not make that a ground of his motion and had not appealed from the previous orders.

APPEAL from an order denying a motion to vacate an order of reference. Actions were brought separately against four fire insurance companies, namely, the Republic, Hanover, Germania and Niagara, each upon the same pleadings, papers, etc., excepting the names of the respective defendants, to recover \$15,000 (\$3,750 each), the face of a policy of insurance against fire for that amount, made by the underwriters' agency of the city of New York, composed and underwritten by each of the defendants, and upon which each is liable for \$3,750, one-fourth thereof, made in favor of Brink & Estes, a firm composed of the plaintiffs, to cover their stock of goods in their store at Lexington, North Carolina.

The complaints allege that the plaintiffs suffered a loss by fire, exceeding the amount of the policy, and which was occasioned by the burning of the county court-house at Lexington, North Carolina, distant twelve yards from plaintiffs' store, the flames from which consumed plaintiffs' store and their stock of goods insured therein; that the same was without any fault or dereliction of plaintiffs; that due diligence was used to save the goods, and that due proofs of loss were furnished and payment demanded and refused.

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The answer admits the making of policy; alleges over-valuation, false swearing, fraud, negligence and want of effort to save goods on plaintiffs' behalf; admits that defendants have paid no loss alleged to be due under said policy.

The actions were commenced in June, 1866. One of them — that against the Republic Fire Insurance Company — was brought to trial at circuit, March 22, 1870. Verdict for plaintiffs, March 25, 1870, \$3,671.40.

An order for a new trial was granted March 25, 1870, on account of error in his charge by the justice presiding.

June 30, 1870, an order was made by Mr. Justice BARNARD, referring the cases to R. F. Andrews, Esq.

The case against the Republic Fire Insurance Company was tried before said referee during about thirty-five sessions. The case was summed up for defendants October 13, 1871; for plaintiffs October 18, 1871, since which time no further meeting has been held. Final papers were submitted November 6, 1871, to the referee. No report has been made by him.

August 20, 1872, plaintiffs served upon the defendants and referee notice of their election under section 273 of the Code to end the reference. A demand was made upon the referee by plaintiffs to return papers, and was not complied with.

A motion was made October 25, 1872, to vacate original order of reference of June, 1870, and to place causes on the calendar of this court for trial.

This motion was denied by order of Mr. Justice FANCHER, dated November 15, 1872, and filed December 20, 1872, from which plaintiffs appealed. Other material facts appear in the opinions.

*Charles H. Hatch*, for appellants.

*Cottrill Brothers*, for respondents.

DANIELS, J. These actions were brought upon four policies of insurance, to recover the amount of a loss sustained by fire within the terms of the policies. The loss resulted from the partial destruction of a single stock of goods, and the items composing it consisted of at least fifty-one in number. They all, however, arose out of one single event, and together constituted but a single demand. It was a loss by fire which the assured was entitled to

indemnity for, under the terms of the policies, and in no proper or legal sense constituted an account, as that term has been used in the statutes of this State, providing for compulsory reference. That term was simply designed to include actions involving the examination of accounts arising out of transactions of business or dealings between parties. The statute enacted before the Code was so construed, and the same terms precisely were used in the enactment of the Code. In construing the previous statute it was held that a great number of items of damage was not sufficient to render an action of covenant referable, as one involving a long account (*Thomas v. Reab*, 6 Wend. 503); that an action for a bill of goods containing fifty items, delivered at the same time, could not be referred against the objection of one of the parties, because altogether they constituted, in reality, but one item (*Swift v. Wells*, 2 How. 79), and the same rule was applied to an action on a bill of lading containing eleven items (*Flint v. Morehouse*, 2 How. 173), and to an account consisting of seven items under two different dates. *Smith v. Brown*, 3 How. 8. These cases are decided authorities against the power of the court to support the references ordered in the present actions, for they unite in holding that an entire demand arising out of a single occurrence or transaction is not a long account within the legal meaning of those terms, as they have been used in the statutes providing for the reference of actions without the consent of all the parties.

The only authority found supplying even colorable support to a different view is that of *Samble v. Merchants' Ins. Co.*, 1 Hall, 560, where a reference was ordered in an action on a policy of insurance, because the loss consisted of a large number of items. But the objection was not raised in that case that the action did not involve the examination of a long account. The reference was opposed simply on the ground that questions of law might arise which could not be disposed of by the referees; and that point was very properly overruled, for the reason that it appeared that the defendants only contested the extent of the loss incurred under the policy. The case, therefore, is not an authority sustaining the power of the court to order a compulsory reference in an action for a loss upon a policy of insurance. That point was in no way considered by the court.

On the other hand, the case of *Freeman v. Atlantic Mut. Ins. Co.*, 13 Abb. 124, which was decided by the general term of the first district, held in effect, that the power to order a compulsory refer-

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ence in such an action did not exist. The loss there consisted of the value of thirty-seven items, shipped at different times within three days. And it was held that the trial of an action for its recovery would not present the case of a long account, as that phrase is used in the statute providing for the reference of issues of fact, on motion of only one of the parties. The case of *Levy v. Brooklyn Fire Ins. Co.*, 25 Wend. 687, supports the same conclusion. In that case the reference ordered at the circuit during the trial of the action was afterward vacated, on motion, by the special term.

For reasons already assigned, these actions could not be lawfully referred against the plaintiff's objection; for they were cases in which the right of trial by jury existed under the laws of the State, when the constitution of 1846 was made and adopted. That instrument, by section 2 of article 1, provided, that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever." Under this provision, the class of cases which could properly be referred against the objection of either of the parties was incapable of being enlarged after its adoption. The effect of it was to perpetuate that right in all cases in which it had been previously used. No power existed, after that, by which, without the consent of the parties, that right could be in any way abridged or denied; for this provision became the paramount law upon the subject. It secured to parties in legal actions a very important privilege, which it is the duty of courts of justice, at all times, to carefully guard and maintain.

The compulsory reference of any action within the protection of this constitutional provision is much more than a mere irregularity, which may be waived by submission to it, or which can only be corrected on appeal; for it involves an entire want of authority to give the case such a direction. Accordingly, what would prove sufficient to waive an irregularity would be without effect upon an order directing a reference without authority to make it. Proceeding under the order, with the trial of the action before the referee, would not, and should not, deprive the party unlawfully sent before such a tribunal of the objection that the order was made without authority; for such a proceeding is taken in subordination to the unauthorized order, and not for the purpose of accepting the direction given by it, or assenting to the surrender of the right to have the cause tried, as it should be, by a jury. It is necessarily of a submissive and somewhat compulsory character, taken in compliance

with the direction given in the order, having none of the elements from which the waiver of an important constitutional privilege could consistently be inferred. A mere irregularity in the proceedings would be waived by subsequently entering upon the trial. But an entire absence of authority cannot be supplied in that manner. If it could, the right of trial by jury would be secured by an exceedingly slight and uncertain tenure. Where there is an entire absence of authority to act, the party injuriously affected by the proceeding may take the objection to it at any time, so long as he has not actually or constructively relinquished his right to do so; and merely advancing in an unauthorized and uncompleted proceeding cannot properly be attended with that result. *Dudley v. Mayhew*, 3 N. Y. 9; *Stevens v. Phoenix Ins. Co.*, 41 id. 149.

In the present instance, the case made by the defendant's papers show that the trial before the referee has never been fully completed by the submission of the cause to him for his decision. But, on the other hand, further acts are shown to have been contemplated on the part of the plaintiffs before the cases are in readiness for a disposition of them by the referee. There is nothing to prevent the plaintiffs, therefore, from now insisting before him, that the unauthorized order conferred no power upon him of hearing the cases, and in the event of an adverse decision reviewing the point upon an appeal from the judgment. For such an objection may very well be taken before the consummation of the trial by a submission for the decision. No proceeding under the order has been completed with the plaintiffs' acquiescence by any fixed or final result; and nothing consequently, has transpired from which it can consistently be mentioned that they have lost their right to insist upon their actions being tried by jury; while the motions made to be relieved from the reference are in direct conflict with the supposition that they have at any time been disposed to assent to the order depriving them of the right to such a mode of trial. And as long as no such assent can be presumed the right to a trial of that description must remain *Garcie v. Sheldon*, 3 Barb. 232.

The orders made on the preceding motions should not be attended with the effect of preventing the plaintiffs from still insisting that their actions should be tried by a jury. For they neither question nor deny that right. They simply deny the motions for relief from the reference, on the ground that the facts alleged in the moving papers were shown by the defendant to have no existence. No



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consideration was given, and no attention directed to the circumstance that the reference was ordered in actions which the parties had the right to have tried by jury. But the motions were made on the sole ground that the referee had lost his power to decide by his failure to do that within the time for that purpose prescribed by the Code, which was found to be unsustained by the affidavits presented. For that reason the orders made on the decision of those motions do not now preclude the plaintiffs from availing themselves of their constitutional privilege of having their action tried by a jury, or render it the duty of the court to disregard that right as long as its existence has been made to appear by the affidavits produced on the part of the defendant by way of answer to the motion on which the order appealed from was made. While these affidavits showed that the plaintiffs were not entitled to be relieved, for the reasons on which they endeavored to maintain their motions, they at the same time established their right to the relief applied for by the facts disclosed, which rendered a reference of the actions altogether improper. This conclusion is maintained by the defendant's proofs, and as long as that is the case, no injury can be sustained by defendant by not requiring the plaintiffs to bring on their motion on that distinct ground. For it is apparent that the defendant could not properly contest the existence of the right which its own proofs disclose. There can be no propriety, therefore, in denying the relief the plaintiffs are thus shown to be entitled to, because it was not urged upon the attention of the court by whose direction the order was made.

The motion was a direct proceeding to vacate the reference, as it was in *Levy v. Brooklyn Fire Ins. Co.*, 25 Wend. 687, where Chief Justice NELSON, on motion, vacated the order because the case was one which the plaintiff had the right to have tried by jury. That is a direct authority in favor of the plaintiff's right to have the reference vacated in the mode pursued in the present instance — by motion at the special term. In ordinary cases a different rule of practice should be maintained. But where a want of power can be clearly shown, the inadvertent order may be properly corrected by a motion made to vacate it.

Omitting to urge the true reason in support of the motion was no waiver of it, so long as the defendant's papers plainly disclosed its existence. And the nature of the objection is such that it may be relied upon at any time, as long as it has not been actually, or con-

structively, extinguished, nor waived by any completed subsequent proceeding. The law has settled the mode in which that may be done; but nothing of that nature has yet transpired in the present actions. For simply proceeding with an uncompleted hearing, under a compulsory order, cannot reasonably be attended with that result.

The order was one which affected a substantial right within § 349, sub. 3 of the Code; and for that reason it was appealable. *Townsend v. Hendricks*, 40 How. 143.

And, as the special term should have vacated the reference and allowed the actions to be tried at the circuit, where a trial was once had without the least embarrassment arising out of the number of the items, for the reason that such a trial was a matter of right of which the party could not, under the circumstances, be properly divested, the order denying the motion should be reversed, and an order entered restoring the actions to the circuit calendar for trial.

But, as the point on which this disposition is made was not taken by counsel, it should be without costs, and on the condition that the plaintiffs stipulate that the evidence of witnesses now absent from the State and used before the referee shall be read on the trial at the circuit, with the same effect as though they were personally present, but subject to all other pertinent objections.

DAVIS, P. J., concurred.

BARRETT, J. (dissenting.) Agreeing that these were not referable cases, and that the references were consequently without authority, I am yet unable to concur in the result arrived at by my brethren.

1. In my judgment the remedy, and the only remedy, was an appeal from the order of reference. No such appeal was taken, but the plaintiffs went to trial before the referee without protest or objection, and proceeded so far that it has become a close question whether or no the case has been finally submitted.

2. Apart from the question of acquiescence, there are considerations of judicial comity involved. To illustrate: A party moves before one judge at special term for a reference. The motion is heard, and after, let us assume, a careful consideration of the facts and the law, it is granted. The next week the unsuccessful party, upon the same papers, moves the same special term, held by another judge, to vacate the order of the preceding week. Is it not

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plain that such a motion should be denied, and the party remitted to his appeal from the order complained of? Yet if the present order be reversed, it must be because we hold that the special term has erred in not reviewing and annulling the action of the previous special term, and that, too, upon a question not altogether free from doubt, and where the original error is established only after an elaborate discussion of the authorities and a careful analysis of the statute.

3. Another objection is that no motion to vacate the order of reference for the reasons assigned by my brother DANIELS has ever been made. This appears from the history of the motions which led to this appeal.

Before any motion was made the plaintiffs claimed that the cases had been finally submitted to the referee, and that he had neglected to decide them within the time limited by law. They therefore served notices of their election to terminate the reference, and a motion, based upon these alleged facts, was thereupon made simply for a recognition by the court of the termination of the reference, and that the causes be restored to the circuit calendar for trial. This motion, so far from attacking, was, in reality, based upon the validity of the original order of reference. It was denied by Mr. Justice LEONARD, and no appeal was taken from such denial. Subsequently, however, an order to show cause against substantially the same relief was obtained from Mr. Justice INGRAHAM, and in his order to show cause leave to renew was embodied. Before the return day of this order, Mr. Justice INGRAHAM vacated so much of it as granted leave to renew, that provision having been allowed inadvertently.

Thereupon the plaintiffs obtained an order to show cause why leave to renew should not be granted. The motion for leave to renew was heard at the same time as the motion based upon Mr. Justice INGRAHAM's order to show cause, and both motions were denied. The plaintiffs now appeal from the order denying the latter motion, but do not appeal from the order refusing leave to renew, and we are not asked upon the argument, nor are we asked in the briefs, nor is there any thing in the papers to show that the court at special term has ever been asked to consider the propriety of the original order of reference.

4. The question really before the court is, whether we should

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affirm or reverse the order denying the motion which was based upon Mr. Justice INGRAHAM's order to show cause.

In my judgment, we should affirm this order, for the reason that it simply denied substantially the same relief which had already been denied by Mr. Justice LEONARD. Mr. Justice LEONARD's order had not been appealed from, leave to renew the motion which he denied had been refused, and no appeal has been taken from such refusal.

So long as Mr. Justice LEONARD's order remains in full force and no leave to renew is obtained, a motion for the same relief cannot be entertained.

I am of opinion that the order appealed from should be affirmed.

*Orders reversed, etc.*

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ANONYMOUS.

*Divorce—what relief allowable in actions for.*

Plaintiff, whose wife was living, married C. J. Afterward he commenced an action for a divorce from C. J., upon the ground that his marriage with her was void, and no defense being put in a judgment dissolving the marriage was entered. He then married C. B. Afterward C. J. applied for leave to defend the action for divorce, which she was allowed to do. C. B. was also allowed to intervene and plead. *Held*, that the only question which could be passed upon in the action was the validity of the second marriage. The validity of the third could not be inquired into, no relief as against that having been asked in the complaint.

THE plaintiff, who was then a resident of England, on the 23d day of April, 1839, intermarried with one Butler, and after living with her for about one year, left her and came to the city of New York, where he has since resided. About three months after plaintiff had left she was delivered of a daughter, the result of their marriage. On or about the 31st of May, 1843, a deed of separation was executed between them, providing among other things that they should live separate and apart from each other, but containing nothing whatever from which it could be claimed or inferred that either of them was to be at liberty to marry again. But, notwithstanding the fact that the marriage itself continued in force, the plaintiff's

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wife intermarried again with one Samuel Green on the 3d of September, 1843, and the plaintiff himself intermarried again on the 21st of October, 1843, at Brooklyn, with Caroline Juliet, the real defendant in this action. After living with her for twenty years, and having by her five children, who are still living, he separated from her on the pretense, that he was in danger of disturbance from interference of his first wife, and that he had just discovered that his second marriage was void, because he had no right to contract it, as he supposed he had by force of the deed of separation between himself and his first wife. He seems to have succeeded in impressing the wife of the second marriage, with the conviction that his marriage with her was void for the reason assigned by him. And she submitted to an adjudication of that fact in this action without interposing any defense. On the 7th of March, 1864, the judgment was recovered, declaring the marriage solemnized in 1843 void for the reason that the plaintiff's first wife continued to be alive. And while the plaintiff had no reason whatever for supposing his wife to have died in the mean time, and after himself having shown her to be living, on the reference ordered in the action, he married again with Constance B., the present respondent, on the 1st day of July, 1865, and continued to live with her, as his wife, until about the 6th of October, 1871, they having during that time two children. On the 18th of October, 1871, Caroline Juliet, the plaintiff's second wife, applied to the court to be permitted to defend the action in which her marriage had been adjudged unlawful, for the reason that she was deceived by the plaintiff's representations, and by that means was induced to allow the action to be undefended. The court on the 24th of that month vacated the previous judgment and allowed her to serve an answer to the complaint, which she did, alleging the validity of her marriage with the plaintiff. The present respondent, the plaintiff's third wife, claiming that the last proceeding was collusive and instituted for the real purpose of establishing the second marriage as valid, was on the 3d day of January, 1872, allowed to intervene in the action for her own protection, and was made a party with leave to plead her rights as against either party to the action. Under that permission an answer was served in her behalf, setting forth in substance the validity of the second marriage, and insisting upon the validity of her own marriage with the plaintiff. The plaintiff's complaint was in no respect changed, and no reply was made by

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the plaintiff to this answer. But the wife of the second marriage replied to the petition of the third wife on which she was allowed to become a party and serve her answer, alleging the validity of the second and the invalidity of the third marriage. The case was referred to and heard before a referee, who reported in favor of the plaintiff against both the second and third wife; and in favor of judgment to that effect. The third wife excepted to the conclusions of the referee, that the plaintiff was entitled to judgment against her establishing the nullity of the marriage, and the court on argument sustained her exceptions and denied the plaintiff that judgment. From the order containing that denial the plaintiff has appealed.

*Smith E. Lane* and *T. C. T. Buckley*, for appellant.

*W. C. Barrett* and *John L. Hill*, for respondent.

DANIELS, J. Although the plaintiff's third wife was allowed to make herself a party to the present action, after the judgment in it was vacated, and the second wife allowed to defend and to plead her rights as against either of the parties, and afterward did so by her answer, that did not enlarge or extend the nature of the plaintiff's action for relief, as it was presented by the complaint made by him. The action still continued to be the same, simply an action to secure a decree of nullity of the plaintiff's second marriage. It was framed before the third marriage took place, and, from the nature of things, could have no possible relation to it. The object of the respondent's answer was not the extension of the plaintiff's action, so as to bring in controversy the validity of her own marriage, but to maintain the correctness of the plaintiff's complaint as to the unlawful nature of the marriage immediately preceding her own. This was for her own protection and the protection of her two children, not to supply the plaintiff with any legal pretense for repudiating her in disgrace as he had her predecessor, by showing her marriage to be void for the same reason that allowed him to disregard the second wife. When either the respondent or the plaintiff himself succeeded in maintaining the invalidity of the second marriage, that was the end of her presence as a party in the controversy. That accomplished the real object for which she was allowed to answer, and so far protected and assured her rights to the plaintiff as her husband.

## Anonymous.

Whether her marriage should also be annulled was a question in no way put in issue by the parties. The plaintiff had made no such claim by his complaint, and the respondent asked no relief of that description by her answer. And it is only where that relief is applied for in the manner prescribed in the statute, by one of the parties to the marriage claimed to be unlawful, on account of the existence of a former husband or wife of one of the parties, that the statute has provided for its allowance. 3 R. S. (5th ed.) 233, 235, §§ 36, 48.

No such application was in any proper manner made in this action, and for that reason it was properly denied by the court, notwithstanding the conclusions contained in the report of the referee. The relief to be awarded in an equitable action, as this was, must still be in accordance with the allegations as well as the proofs. That it appears from the proofs taken that the plaintiff may be entitled to it is not sufficient, when the pleadings have wholly omitted to present the matter for the action and adjudication of the court. *Field v. Mayor*, 6 N. Y. 179; *Kelsey v. Western*, 2 Cow. 501, 506; *Rome Exchange Bank v. Eames*, 1 Keyes, 588. The plaintiff, whose good fortune has so far shielded him from the legal consequences of his repeated violations of the laws of the State, may yet be able to secure the right now denied him. But that would be a very inadequate reason for relieving him from the ordinary requirements the statute has prescribed for cases of this description. If he is to be relieved at all, and, under the sanction of the judgment of a court of justice, be placed in a situation where he may deceive and induce still another woman to marry him, it should only be by strictly bringing himself within all the provisions of the statute upon this subject, whether they relate to the grounds of the action itself, or the forms to be observed in bringing them to the notice of the court. The case is one of strict right, and not one which deserves to be promoted by any favorable interposition on the part of a court of justice. Where neither the fear of the laws nor the duty of securing a reputable social position for his own children have proved sufficient to restrain the plaintiff from the open violation of their prohibitions, he should not only prove, but, in addition to that, present by his complaint, in the mode prescribed for that purpose by the statute, the case which may entitle him to be set at liberty to indulge in a repetition of his former offenses. Until that shall be done, no injury whatever can result from subordinating his

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freedom to the obligations he apparently regards as the inconvenient consequences of his third marriage. The plaintiff is entitled to no such relief as he now demands in this action. It has neither been demanded by himself nor his wife, as the statute requires such an application to be made. For that reason, the order appealed from was strictly right, and it should therefore be affirmed, with costs.

DAVIS, P. J., and DONAHUE, J., concurred.

*Order affirmed.*

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HOLLOWAY, appellant, v. STEPHENS *et al.* (No. 2.)

*Practice — failure to reply — Agency — authority of general agent.*

In an action to restrain defendant from bringing suits upon certain agreements made between him and plaintiff's agent, to cancel such agreements, and for an accounting, defendant set up a claim for expenses incurred on account of the agreements, and also damages arising from plaintiff's refusal to carry out the same. No reply was put in and no objection raised at the trial to the want of a reply.

*Held*, that it was doubtful whether the failure to reply admitted the claim of defendant; but if it did the omission of defendant to object at the trial constituted a waiver of the defect in plaintiff's pleadings and the objection could not be raised on appeal.

It appeared that the amount of sales in plaintiff's business in New York did not exceed \$50,000 per annum. *Held*, that it was not within the apparent scope of the authority of plaintiff's agent having general charge of his business in New York to enter into contracts for advertising plaintiff's business in Mexico, the West Indies and South America at an expense of over \$180,000 a year.

MOTION for a re-argument of an appeal, made on behalf of Benjamin F. Stephens, one of the defendants. The appeal was taken by the plaintiff, Thomas Holloway, from a judgment in favor of said Stephens for \$171,237.43 entered upon the report of a referee. The complaint in the action asked that defendant, said Stephens, be restrained from continuing or bringing any actions against the plaintiff by reason of any claim under certain agreements made between one Haydock (who was also made defendant)



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as plaintiff's agent, and said Stephens; that the agreements be declared null and void, and that an account be taken of any sum due from plaintiff to said Stephens, the plaintiff offering to pay the balance found due.

The answer of Stephens alleged that by the refusal of plaintiff to carry out said agreements he (Stephens) had been damaged in the sum of \$200,000, for which sum judgment in the way of affirmative relief was asked. The agreements in question provided for the publication of an advertisement of certain medicines prepared and sold by plaintiff, in sundry newspapers published in Mexico, the West Indies and various parts of South America.

Upon the former hearing, the judgment entered upon the report of the referee was reversed and a new trial ordered. At that hearing the only question argued was as to the damages awarded by the referee, which appeared to be based upon the evidence of Stephens as to what the profits of the agreements would have amounted to, had he been allowed to go on and complete them. The estimate was made upon a calculation of the sum to be paid for advertising in a specified number of newspapers a certain length of time and deducting therefrom 10 per cent for probable failures of newspapers, and a specified sum for postage, and amounted to \$270,710.88, of which sum Stephens was allowed as prospective profits, fifty per cent or \$135,355.44.

A statement of the findings in the opinion of Mr. Justice DAVIS delivered upon the former hearing, and also further facts will be found in a report of this case at page 2 of the addenda to this volume.

*John Clinton Gray*, for appellant, cited *Bolles v. Duff*, 56 Barb. 567; *McGarry v. Board of Supervisors*, 1 Sweeney, 217; *Newell v. Wheeler*, 4 Rob. 190; *Rector, etc., of Trinity Church v. Higgins*, id. 372.

*Titus B. Eldridge*, for respondent.

DANIELS, J. The motion for a re-argument of the appeal taken in this cause proceeded chiefly on the ground that by omitting to serve a reply the plaintiff should be held to have admitted what is relied upon as a counter-claim, as set forth in the defendant's answer. The answer, in this respect, alleges a claim for expenses and

disbursements in the partial performance of the contracts referred to in the complaint, and also damages sustained by the defendant Stephens, arising out of the plaintiff's refusal to fully perform such contracts. The claims set forth are wholly unliquidated, and in no way described or determined by the contracts themselves. And for that reason it may very well be doubted whether the failure to reply would in any view admit their existence as they are set forth in the answer. Where the contract set forth, by its own terms, determines the nature and extent of the demand claimed, there a failure to answer or reply as the case may require could be very well held to admit the existence and extent of the demand relied upon as a cause of action or counter-claim. But that is not the ordinary effect of a default in answering or replying, where the demand is unliquidated and unadjusted, as those set forth by the defendant most clearly are. Another reason also appears in the case why the omission to reply should not be held to produce an admission of the defendant's demands on this appeal, and that is, that no such point was made upon the trial before the referee; on the contrary, the trial proceeded before him precisely the same as though a complete issue had been formed by the pleadings controverting the defense alleged in the defendant's answer. And where an action is tried in that manner, the defect in the pleadings is, at least for the time being, waived. The party who could raise the objection and fails to do so, practically admits the sufficiency of his adversary's pleadings. And that admission must continue to be effectual throughout the proceedings afterward taken by way of appeal from the judgment. Any other rule would be productive of great injustice, for it would allow a party to be ensnared into a final defeat through an oversight, which could readily be supplied by motion, if its existence were made the subject of objection during the progress of the trial involving the examination and determination of the issues in the action. The rule is a familiar one, which requires objections, that the party may be able to remove by proof or the amendment of his papers or proceedings, to be made while it may be in his power to correct and supply the defect; if he fails to do that, he cannot afterward urge the omission as a ground of error, and this rule has been applied directly to defects and omissions in the pleadings, as well as other proceedings in legal or equitable actions. It operates in the nature of an estoppel arising out of the circumstance that the party having a defective pleading is

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allowed to proceed with his case the same as though no defect whatever existed.

After such a proceeding, it would be inexcusably harsh to allow the defect to be made use of as a means of defeating the party permitted to rely upon the conviction that his pleadings were sufficient within the judgment of his adversary. The rule of practice governing these subjects will be found to sanction no such injustice. In the case of *Williams v. Hayes*, 20 N. Y. 58, it was held by JOHN-SON, C. J., that "When a party wishes to avail himself of an implied admission of the pleadings, it should affirmatively appear that the attention of the court, or other tribunal, has been called to it. In point of fact, causes are tried and disposed of, under the present system, with little or no reference to the pleadings, unless some question is made upon them at the trial. And when no such question is there made, none ought to be allowed to be afterward raised. Any other rule would throw the duty of vigilance upon the wrong party." And to the same effect, in substance, are the cases of *McDonald v. Christie*, 42 Barb. 36; *Barnes v. Perine*, 12 N. Y. 18; *Bumstead v. Dividend Mutual Insurance Company*, id. 81. This is a wise and salutary rule, which ought to be uniformly observed. Important rights are often waived and lost by not presenting them at the proper time for doing so. *Vose v. Cockcroft*, 44 N. Y. 415. And no reason exists for creating any exception in favor of those presented upon the pleadings. The failure to object conceded, in effect, that the pleadings in the action were in proper form for its complete trial upon the evidence. And after that it became the duty of the court to dispose of the points made upon the appeal as that presented them.

By the terms of the contract made on the 25th day of July, 1865, and which included the principal portion of the advertising to be done, the notices to be published were to be inserted in newspapers of twelve months' existence, and not at the time having the plaintiff's advertisements in them. Under that restriction the defendant Stephens could only demand payment for the advertisements published in conformity to it, and, to entitle himself to the compensation agreed to be paid, he was bound to show that he had conformed to that restriction. It was for the advertisements in the papers having the qualifications mentioned that he was to be paid, and he was bound to prove that to be their character before the stipulated payments could be claimed. That was not done, and for

that reason he was erroneously allowed payment for advertisements inserted in these papers. Besides that, the proof did not show that the advertisements were continued for such periods of time as would entitle the defendant to a judgment for the large amount of compensation awarded to him by the referee. Merely showing the publication in the papers, combined with the circumstance that the publishers demanded a certain sum of money for what they had done, was not sufficient for that purpose. Both together did not prove that the advertisements had been inserted in the papers for such a period of time as would entitle the defendant to the compensation claimed and allowed as due to him. That could only be properly established by showing the continuance of the advertisement for such periods as would equal the amount claimed to be due.

The proof as to the large amount of damages claimed was still more unsatisfactory. It depended upon a simple estimate made by the defendant, depending, to a considerable extent, upon his success in preceding similar enterprises. Before such an allowance could be claimed, the evidence should have proved, to a reasonable degree of certainty, what expenses would have been required to perform the defendant's undertaking, the risks and value of the labor attending it, and the amount of the contract price that would then have remained unexpended, and that should be done by satisfactory evidence. To warrant the recovery of damages to the amount of \$130,000, something more than general statements and estimates should be required.

The business in which the agent was engaged, who entered into the contract for advertising with the defendant Stephens, was carried on at the city of New York. Its annual sales did not exceed about \$50,000, and there is good reason for believing that they fell very much short of that amount. The business consisted in manufacturing, advertising and selling patent medicines compounded by the plaintiff. The agent was authorized to do whatever was requisite and necessary to be done in and about that business as fully as the plaintiff might do in case he was personally present. This conferred upon the agent all the power the business itself could indicate that he possessed to persons dealing with him. They could infer no greater authority from the manner in which the business would ordinarily be carried on. This made the agent a general one; but, at the same time, his powers were, in either view, limited to what was required to be done in the management and

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transaction of the business under his control. For even a general agent cannot bind his principal by the performance of any act beyond the apparent and ostensible scope of his authority. He is to be presumed to have all the power which the nature of the business he may be engaged in requires to be used. But when he exceeds such powers, even the acts of a general agent will fail to bind his principal, for third persons have no reason to suppose that powers not properly exercised in the business intrusted to him have been conferred even on a general agent by his principal. *Munn v. Commission Co.*, 15 Johns. 44; *Lightbody v. North American Insurance Co.*, 23 Wend. 18; 1 Pars. on Cont. (5th ed.) 41, 42; *Witbeck v. Schuyler*, 44 Barb. 469. These cases all require the act of a general agent to be within the apparent scope of his authority, in order that it shall be binding upon the principal. But how the advertisement of such a business in foreign languages and foreign countries, to the extent agreed upon between the plaintiff's agent and the defendant Stephens, can be brought within the scope of this agent's apparent powers, in no way appears from the case presented as the basis of the present motion. If it cannot, then the defendant must be restricted to such compensation as he may prove to be equitably due to him under the offer contained in the plaintiff's complaint. For the plaintiff has at all times disapproved of such acts of his agent as were not included in the affairs of the business intrusted to him, and the agreements involved in the present controversy were distinctly disaffirmed and disavowed as soon as they were brought to his attention. Partial payments of small amounts were made upon them, but they were made by the agent without the knowledge or direction of his principal. They in no sense, therefore, constituted a ratification of the agent's acts in entering into the contracts. If he could not make them, he had no power to ratify them.

These agreements stipulated for the foreign advertising of the plaintiff's compounds for a period of two years at an expense exceeding \$130,000 a year. While it is not necessary to decide the point now, it can hardly be conceived to be possible that the credulity of the defendant would have permitted him to suppose that the plaintiff's business could require such an expenditure, or that his agent had any power to increase it. Under the evidence now in the case little if any reason exists for supposing that the plaintiff's agent could render him liable for such important consequences. Certainly

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the present motion must be denied and the case retried as directed by the order already entered.

DAVIS, P. J., and BARRETT, J., concurred.

*Motion denied.*

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APPLETON v. BOWLES *et al.*, appellants.

MILLER v. BOWLES *et al.*, appellants.

*Bankruptcy — conflict of jurisdiction — proceedings in State courts against bankrupt.*

M. brought action against defendants, a banking firm, and attached certain property. Subsequently A., a special partner in the firm, commenced an action for dissolution and accounting, and a receiver was appointed, and in due time a decree made dissolving the partnership. Afterward a petition in bankruptcy was filed, and defendants declared bankrupts. Upon an application for an order for the receiver to turn over the assets of the firm in his hands to the assignee in bankruptcy:

*Held*, that the proceeding in bankruptcy did not deprive this court of authority in the matter. This court and its receiver having first obtained possession of the property and control of the litigation, had the right to finish its proceedings before being interfered with by any other jurisdiction.

*Held*, also (following *Wilson v. City Bank of St. Paul*, 9 Alb. Law Jour. 77), that, under the bankrupt law, the attachment of M. constituted a valid lien in preference to the claim of the assignee in bankruptcy.

APPEAL from an order denying a motion to vacate a decree, and to direct a receiver appointed by this court to deliver the assets in his hands to an assignee in bankruptcy. The facts appear sufficiently in the opinion.

*Everett P. Wheeler*, and *Vose & McDaniels*, for Alvah Miller, respondent. The receiver having taken possession prior to the petition in bankruptcy cannot be disturbed by the assignee. *Sedgwick v. Menck*, 6 Blatchf. 156; *Clark v. Binninger*, 4 Benedict, 88; 5 Bankr. Reg. 230; 38 How. 341. The lien having been confirmed by order of the court is not affected by the bankruptcy act. 8 Bankr. Reg. 97; *Matter of Bernstein*, 2 Benedict, 44; *Matter of Bigelow*, id. 469; also cited *Sedgwick v. Menck*, 1 Bankr. Reg. 204; *Langley v. Perry*, 2 id. 180; *Hawkins' Appeal*, 8 Am. Law Reg., N. S., 205.

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*Sanford, Robinson & Woodruff*, for the assignee in bankruptcy.

*Julien T. Davies*, for Nathan Appleton.

*James McNamee*, for Bowles Brothers.

DONOHUE, J. Alvah Miller, on the 13th day of November, 1872, on a proper affidavit and papers showing a cause of action against the defendants herein, Bowles Brothers, applied to Hon. E. L. FANCHER, a justice of the court, for, and obtained an attachment against the property of the defendants, as non-residents, and under the attachment certain property was attached in that suit, and the action proceeded to judgment.

The plaintiff, Appleton, on the 21st of November, 1872, applied to this court on proper process, the defendants appearing, and asked for a receiver of the partnership effects, claiming to be a special partner, and also asking a dissolution and accounting. On that day the order was made appointment a receiver, and on the 27th of January, 1873, a final decree dissolving the partnership and continuing the receiver was entered in this cause. Prior to the last order, on the 30th of November, 1872, and on cause shown therefor, this court directed the sheriff to have the property attached in the suit of Miller, turned over to the receiver, subject to the rights acquired by the sheriff, and the plaintiff in the suit of Alvah Miller; Judge FANCHER, in his opinion on that motion, expressly holding that this possession of the receiver must be subject to the lien of the attaching creditors \* \* \* and they must be paid in full in the order of the liens of the attachments.

On February 3, 1873, a petition in bankruptcy against Bowles Brothers was filed in Massachusetts and an assignee appointed under proceedings thereunder, March 17, 1873. On the 9th of April, 1873, the receiver applied to this court for an order directing him to deliver the assets in his hands to the assignee in bankruptcy. The court on the motion in substance ordered him to hold the funds until the further order of the court. The attorney for the plaintiff Appleton then applied to the court to vacate the decree in this suit and to direct the receiver to deliver the assets to the assignee; this motion was denied and A. Gordon Bowles appealed. The assignee in bankruptcy, though heard on the motion, did not appeal. The appeal was heard and the order affirmed. The plaintiff, in the suit of Alvah Miller, having obtained

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judgment, applied to this court to be paid out of the money in the receiver's hands, which motion was granted and an appeal taken. In this appeal defendants and the plaintiff, Appleton, and also the assignee in bankruptcy join.

The first ground of appeal would seem to be that the bankrupt court, having taken possession of the estate under proceedings, takes from this court all further authority in the matter, and that all the assets must be handed over to such assignee, no matter what may be the question litigated here. This is a mistake; this court and its receiver first obtained the possession of the property and control of the litigation and has the right to finish its proceedings before being interfered with by any other jurisdiction. *Taylor v. Canyl*, 20 How. 583, and cases there cited. If the assignee has rights or is entitled to the fund, his title and right can be and will be disposed of by this court as the law shall direct.

The next ground on which the appeal is pressed is, that the levy on the attachment is void under the bankrupt act, and thus this court will not give to the petitioner Miller a preference prohibited by that act, and if the case presented facts showing such prohibited preference, this court would be bound to protect the assignee against it. Whatever may have been the opinion on or course of decisions heretofore on that point, we suppose the case of *Wilson v. City Bank of St. Paul*, 9 Alb. Law Jour. 77, decided by the supreme court of the United States at its present term, is decisive on the question. In the opinion of the court delivered by Mr. Justice MILLER, in which he thoroughly examines the point, he holds that liens by attachment or execution, obtained prior to the proceedings in bankruptcy, in State courts are valid and take preference to the claim of the assignee unless an intent to evade the bankrupt act is shown, and that the fact of taking steps to obtain satisfaction by the ordinary course of law, with a knowledge on the part of the creditor that the debtor is insolvent, is not evidence of such improper intent, and that, in the absence of any further facts, the party who obtains such preference can hold it. As on this point the opinion is conclusive in this court, it follows that the preference obtained by Miller was valid, and the order directing payment to him out of the fund obtained from the property to be attached must be affirmed.

DAVIS, P. J., and DANIELS, J., concurred.

*Order affirmed.*



PARK v. MUSGRAVE *et al.*, appellants.*Injunction — sale of stocks deposited as a "margin."*

It was alleged in the complaint that defendants, a firm of stock brokers under claim of, but without right, were about to sell certain shares of stock deposited by plaintiff with them as a "margin" in a speculative transaction; that such sale would inflict irreparable injury upon plaintiff, and that the stock could not be then sold without a ruinous sacrifice by reason of a low market, and an accounting was demanded. *Held*, that plaintiff was not entitled to an injunction restraining the sale.

APPEAL from an order continuing an injunction restraining Musgrave & Co., the defendants, from selling certain stock belonging to plaintiff. The complaint contains in substance the following statement: Prior to September 27, 1873, Musgrave & Co. were carrying various stocks for one Hatch; they were also carrying 1,600 shares of Panama Railroad stock, purchased by Hatch on joint account of himself and plaintiff, but plaintiff was not interested in any other of the stocks. On September 27, 1873, plaintiff agreed that he would furnish Musgrave "sufficient security for margin," as to all the stocks, if Musgrave would carry them until orders from himself as to the Panama stock, and orders from Hatch as to the other stocks. Musgrave agreed with the plaintiff, "in consideration of the plaintiff's furnishing such security for the margin, the aforesaid stock shall be carried over the present time of low prices, not exceeding one year." Plaintiff then gave Musgrave 500 shares of Loan and Indemnity stock. In the early part of October Musgrave & Co. requested plaintiff to furnish them with other security upon the said agreement for carrying the stocks, and in response thereto the plaintiff gave them \$20,000 in bonds of the Cayuga Lake Railroad Company. On the 14th of the same month Musgrave called on plaintiff, and told him that if he would give them \$20,000 cash in place of the railroad bonds, they "would carry the stocks covered by said agreement, and make no further call for security or margin, until the said Panama stock fell to \$70 per share." Plaintiff assented to the modification of the agreement, and gave Musgrave \$20,000 cash, and took the bonds. The Panama stock has never fallen to \$70, but has always been as high as \$75 and upward.

On November 5th, Musgrave & Co., as a favor, requested plaintiff

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**Park v. Musgrave.**

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to take 100 shares of the Loan and Indemnity stock, and give them \$10,000, and the plaintiff did so on November 5th or 6th.

On November 13th, while plaintiff was sick, and unable to attend to business, he received a notice of the sale of the Panama stock, and the Loan and Indemnity stock for November 15th. Plaintiff notified Musgrave & Co. that he was sick, and that if they sold the stock he would hold them responsible. Musgrave & Co., however, did sell the 1,600 shares of Panama stock, at an average price of \$84 a share, and realized \$134,400.

On November 22d, Musgrave & Co. gave plaintiff notice of the sale of the Loan and Indemnity stock. This is the stock the sale of which is restrained by the order appealed from.

The complaint states that plaintiff has never received any account from Musgrave & Co., "in respect of said stocks and transactions," nor any statement showing what balance is due in respect to them, nor has any demand been made of the plaintiff for the payment of any sum or balance, and that irrespective of said agreement to carry said stocks, no sum is due from the plaintiff to Musgrave & Co., and avers, that if the agreement is lived up to, Musgrave & Co. have no right to sell, that the sale would be an irreparable injury to the plaintiff and a violation of his rights under the agreement, and that no sale could now be made except at a ruinous sacrifice in consequence of a low market; and prays an injunction against the sale of the Loan and Indemnity stock, the appointment of a receiver, the taking of an account, and the delivery to plaintiff of his said stock. The answer substantially denies the agreements set up in the complaint and denies its material allegations.

*John Sherwood and Augustus F. Smith, for appellants.*

*Blanchard & Miller, and E. L. Funcher, for respondents.*

**BARRETT, J.** The plaintiff does not make out a case for equitable relief. The substance of his complaint, stripped of all mere matters of evidence, is that the defendants, under claim of, but without real right, are about to sell certain shares of stock which belong to him, and which he deposited with them as a "margin" upon a certain speculative transaction. He claims that he is entitled to these shares, freed from the pledge, in consequence of the alleged misconduct of the defendants with respect to the principal transaction.

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If his statements are true, he has a perfect remedy at law. Let him demand his collaterals and, if they are refused or sold, bring his appropriate action for damages.

There is no averment of the defendants' insolvency, nor is even a doubt cast upon their responsibility. It is not charged that there is any thing peculiar in the character of the shares, that they cannot be readily replaced, nor that there is any difficulty in showing their market value.

The mere general averment of irreparable injury, without showing in what respect, as a matter of fact, is of itself insufficient to justify the granting of an injunction. The fact of a "low market" is not enough, because, for aught that appears, the plaintiff can protect himself at the sale, and for the further reason that his damages will not be measured by the prices realized thereon.

Nor can the difficulty suggested be avoided or evaded by the demand of an accounting. Such a prayer is a *non sequitur* from the statement of the cause of action. On the plaintiff's own showing he had but a single transaction in stocks with the defendant, and the *gravamen* of his complaint is the tortious conversion of these stocks, resulting from their sale in violation of an alleged agreement to hold them until the happening of a certain contingency.

As the injunction, for these reasons, should not have been granted, it will be unnecessary to consider the other questions discussed upon the argument.

The order appealed from should be reversed, the motion to continue the injunction denied and the temporary injunction dissolved, with \$10 costs.

DAVIS, P. J., and DANIELS, J., concurred.

*Ordered accordingly.*

WALLACE *et al.* v. AMERICAN LINEN THREAD COMPANY, appellants.

*Practice — appealable order.*

An order refusing to grant a commission to take the testimony of a foreign witness affects a substantial right, and is appealable.

*Treadwell v. Pomeroy*, *ante*, p. 470, distinguished.

APPEAL from an order of the special term denying a motion for a commission to take the testimony of a foreign witness. The facts appear sufficiently in the opinion.

*John Cochrane*, for appellant.

*E. F. Bullard*, for respondent.

Per CURIAM. We are of opinion that an order denying a motion for a commission to take the testimony of a foreign witness is appealable. Such an order affects a substantial right. The denial of the application may prevent the party from establishing his case or defense by depriving him of the only means of getting his evidence before the court. We held in *Treadwell v. Pomeroy*, *ante*, page 470, decided at the present term, that an order granting a commission is not appealable, but the distinction is obvious. The granting of a commission cannot affect prejudicially a substantial right, because no party can be said to have such a right to prevent his antagonist from obtaining, in the ordinary forms of law, the testimony of witnesses whom he is unable to produce personally upon a trial. In this case the court denied the motion on the ground that the testimony sought was irrelevant. If it were clearly so, the discretion of the court would have been properly exercised. But we are of opinion that the testimony would not be wholly irrelevant. It might be important on the question of damages, and its admissibility for other purposes may depend upon the circumstances arising in the course of the trial. The discretion of the court is a judicial one, and is liable to be reviewed. The order should be reversed with \$10 costs of the appeal and disbursements therein, and the order for commission granted.

*Order reversed.*

## SECOND DEPARTMENT.

GENERAL TERM, FEBRUARY, 1874.

### BROMLEY v. MILLER.

*Statute construction—Laws 1864, chap. 811; 1872, chap. 680—Will of non-resident—proof of—power to executors to convey real estate.*

2 T & C 578  
37 Mis'708

The legal effect of the statutes in relation to wills made in other States (Laws 1864, chap. 811; 1872, chap. 680) is to make an exemplified copy of such a will, and the proofs thereof, when recorded, equivalent to proof of the will in this State.

A resident of New Jersey, in her will, gave her executors power to convey her real estate. The will was proved in New Jersey and an exemplified copy, with the proofs certified by the surrogate of the county where the testator resided, recorded in the office of the surrogate of Kings county. *Held*, that a conveyance by the executors of testator's real estate in Kings county was valid.

CASE submitted without action.

A contract was entered into between the parties by which plaintiff agreed to sell and defendant to buy a house situated in the city of Brooklyn. Plaintiff tendered a deed conveying said premises which defendant declined to receive, on the ground that plaintiff's title thereto was defective as to the undivided one-fourth part, which had been conveyed to him by the executors under the will of one Harriet E. Perry, deceased.

Said Harriet E. Perry, who was seized of said fourth part in her life-time, was a resident of Morris county, New Jersey, where she died June 2, 1859. By her last will she authorized and empowered her executors, in their discretion, to sell and convey, from time to time at public or private sale all or any of her real estate. Her will was proved before the surrogate of Morris county and was admitted by him to probate July 6, 1859, and filed. Within three months thereafter the said will was transmitted to the prerogative court at Trenton, as required by the laws of New Jersey, and filed, and has

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since remained there. There were three subscribing witnesses to the will, all of whom were living at the time of probate, but only one of them was examined as a witness thereto. It did not appear that the will was proved as a will of real estate.

An exemplified copy of said will and the proofs as certified by the surrogate of Morris county May 5, 1868, was recorded in the office of the surrogate of Kings county May 11, 1868, after which time the executors named in said will conveyed the one-fourth part in question to the plaintiff.

The questions submitted to the court were as follows :

1. Is the record of said will and proofs in the Kings county surrogate's office presumptive evidence of said will and of the due execution thereof for all the purposes intended by the act of April 23, 1864 (chap. 311)? 2. Did the conveyance by said executors to Henry Bromley, the plaintiff, vest in him the interest of which Harriet E. Perry died seized? 3. Will a conveyance by said Bromley to said Miller, the defendant, vest in said Miller a good and perfect title to the premises?

*A. B. Capwell*, for plaintiff.

*Miller, Peet & Opdyke*, for defendant, cited, as to the proof of the will, 3 R. S. (5th ed.) 139; 144; Nixon's (New Jersey) Digest, 643, § 17, 644, § 19, 1032, § 24.

As to whether the executors could convey, *Conklin v. Egerton*, 21 Wend. 430; *Newton v. Bronson*, 13 N. Y. 587; *Petersen v. Chemical Bank*, 32 id. 21; *Middlebrook v. Merchant's Bank*, 3 Keyes, 135; 4 Kent's Com. (11th ed.) 606; 2 id. 549; Story's Conf. of Law, chaps. XI and XII; *Young v. Brush*, 28 N. Y. 667; *White v. Howard*, 52 Barb. 306.

GILBERT, J. The legal effect of the statute of 1864 (Laws 1864, chap. 311 (as amended), Laws 1872, chap. 680) is to make an exemplified copy of a will made in another State or Territory of the United States, and the proofs thereof, when recorded, equivalent to proof of the will in this State. The statute is not express on this point, but such, we think, is the inference from the language employed; and it has been so regarded by the profession. Numerous titles rest upon this interpretation. We are not, therefore, disposed to indulge any verbal criticism, the effect of which would be to cast doubt upon the meaning attributed to the statute.

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Treating the will as having been duly proved here, there can be no question that the title offered the defendant is good. The executors had power to sell and convey. The conveyance by them to Bromley, in execution of the power, vested the title in the latter, and a conveyance by Bromley to Miller will vest the title in Miller. The question, whether the executor of a foreign will can convey lands in this State, is not presented. Neither a foreign or domestic executor, as such, has power to convey lands. The conveyance, by the executors in this case, is operative only by virtue of the power of sale contained in the will. They act in conveying the land as devisees of a power created by the owner of the estate, and not under any authority derived from the probate court.

Judgment is, therefore, rendered against Miller, requiring him to complete his purchase, without costs.

*Judgment accordingly.*

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CRANE, appellant, v. STIGER *et al.**Foreclosure — opening sale — laches — rights of purchaser.*

During the pendency of an action to foreclose a mortgage, the plaintiff agreed with the mortgagor that he would, at the foreclosure sale, purchase the mortgaged property for the amount of the judgment. At the sale, the property was bid in by a son of plaintiff for a small sum, and a judgment for deficiency for the greater part of the mortgage debt entered against the mortgagor. *Held*, that it would be unconscientious and inequitable to allow the sale to stand.

The sale was made in April, 1872. The mortgagor did not give notice of a motion to have it opened until March 31, 1873. *Held*, that the laches of the mortgagor only affected the terms on which he should be relieved, and the purchaser had not acquired a vested right which could not be interfered with by the court.

APPEAL from an order of the special term directing a resale of property previously sold under a decree of foreclosure.

The plaintiff was, in 1870, the owner of five houses and lots in Warren street, in the city of Brooklyn. During that year he sold them to Jacob M. Stiger, one of the defendants, for \$4,600 each; in the aggregate \$23,000. The consideration was all mortgage. Upon each house was already a mortgage of \$2,000, and Stiger

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executed to plaintiff a further mortgage of \$2,600, giving in all five mortgages. The houses and lots were subsequently conveyed to James S. Taylor, another of the defendants. These mortgages were foreclosed, a separate action being instituted upon each one. The mortgaged premises were, on the 15th day of April, 1872, sold by Abel Crook, Esq., the referee appointed for that purpose by the court. They were purchased by Benjamin F. Crane, a son of the plaintiff, he paying for two houses \$500 each, and for the other three \$50 each. The referee's deeds were duly executed, delivered and recorded, and judgments for deficiency, amounting in the aggregate to \$15,083.03, were entered against Stiger & Taylor. The purchaser took possession of the houses, and improved and rented the same.

Suit on said judgments was brought by plaintiff in New Jersey, in which State Stiger and Taylor resided, and the suit had nearly proceeded to judgment when, on March 31, 1873, plaintiff's attorney was served with motion papers and an order to show cause why said sales should not be set aside, and said judgments of deficiency vacated.

In support of the motion, defendant Stiger swore in brief, as follows: "That when he bought said five houses and lots from the plaintiff and gave back the five mortgages, it was agreed between him and one Stebbins, who was plaintiff's agent for the sale of the premises, that he, Stiger, was not to be held personally liable on the mortgages; that the consideration was \$7,000 for each house and lot, and the balance of the contract above the amount of the mortgages was taken in New Jersey land, deeded to plaintiff by Stiger; that after the actions of foreclosure were commenced, plaintiff agreed with said Stiger to buy in the property on the sale for the amounts of the judgments in each case, and at any time within one year, to reconvey the property to Stiger, upon the payment of \$1,000 on each house, and again leave the balance on mortgage." The defendant Taylor swore that, in consideration of a release of his wife's dower in the premises for \$75, plaintiff agreed not to enter a judgment for deficiency against him.

Stiger, Taylor, and several others, swore that the houses and lots sold were worth \$4,600 and upward.

The plaintiff, in his affidavit upon the motion, contradicted the statement of Stiger and Taylor as to transactions with him, and denied that Stebbins was ever his agent.



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An order was made, that said sales be opened and resales had, and that the judgments of deficiency be vacated upon Stiger filing a bond, in penalty of \$5,000, as security for any deficiency in resale.

Plaintiff, on new affidavits, moved to vacate or modify the order last mentioned; opposing affidavits were put in, and on the 7th of May, 1873, an order was made ordering a resale, but allowing the judgments to stand as security, with injunction restraining plaintiff from proceeding further in said suit in New Jersey.

From this order the appeal is taken.

*Truman H. Baldwin*, for appellant.

*William Dean*, for Benjamin F. Crane, purchaser.

*John H. Bergen*, for respondent.

GILBERT, J. The court below must have found that the agreement sworn to by Stiger, namely, that the plaintiff should purchase at the foreclosure sale for the amount of the judgment, was in fact made. We do not feel warranted to reverse that conclusion. Assuming the existence of that agreement, it would be unconscientious and inequitable to allow the sale to stand. *Frost v. Myrick*, 1 Barb. 370. The defendant, it is true, has been guilty of laches, but that fact affects only the terms on which he should be relieved. Nor has the purchaser acquired a vested right which prevents the interference of the court. On the contrary, by becoming a purchaser, he submitted himself to the jurisdiction of the court for all purposes relating to him in that character as if he had been a party to the suit. *Requa v. Rea*, 2 Paige, 341; *Cazet v. Hubbell*, 36 N. Y. 677.

The order should be affirmed, but without costs.

*Order affirmed.*

**KLOTS *et al.* v. FINCKE *et al.*, appellants.**

*Practice — irregular appeal — frivolous defense — what is not.*

An appeal was made from an order directing judgment, and not from the judgment. *Held*, that the respondent could avail himself of the irregularity only by a motion to dismiss the appeal.

In an action against a married woman, as indorser of a note, the answer put in issue the demand of payment and notice of non-payment, and averred that her indorsement was procured while under duress. *Held*, that the answer was not frivolous.

APPEAL from an order of the special term directing judgment upon the answers of the defendants as frivolous.

The action was brought to recover \$2,411, besides interest and protest fees. The complaint alleged that Robert Fincke, one of the defendants, made his promissory note for the above-named sum payable to the order of the other defendant, Wilhelmina Fincke, who is the wife of Robert; that said Wilhelmina had a separate estate, and that previous to the maturity of the note "for the benefit of her separate estate, and with intent and upon the express agreement that the same should be charged thereby, indorsed and transferred the said note to these plaintiffs for a valuable consideration, and in and by said indorsement expressly declared and agreed that the same was for the benefit of her separate estate and chargeable thereon." The presentment, non-payment and protest of the note, and notice thereof to defendants, were also alleged.

Defendants answered separately. Robert Fincke admitted that he made a promissory note during the month mentioned in the complaint for the amount, and payable about the time stated, but averred that he had not knowledge or information sufficient to form a belief as to whether the note made was the same mentioned in the complaint, and he, therefore, denied the same. Want of consideration was also alleged.

The defendant, Wilhelmina Fincke, admitted the indorsement of a note, and denied knowledge as to whether it was the same mentioned in the complaint, alleged want of consideration and averred that the indorsement was through the command and compulsion of her husband, "all of which was well known to the plaintiffs at the time they received the note." She also denied that "she indorsed said

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note for the benefit of her separate estate, and with intent and upon the express agreement that the same should be charged thereby or that her separate estate ever received any benefit or consideration whatever.

In each answer the allegations of the complaint not admitted specifically were denied. A motion was made for judgment upon the answers of the defendants, and each of them as frivolous, which was granted at the Kings special term, May 26, 1873. Upon this order judgment was duly entered.

*J. H. Cornell*, for appellants. The answers of defendants, and especially that of *Wilhelmina Fincke*, are not frivolous. *Youngs v. Kent*, 46 N. Y. 672; *Allis v. Leonard*, id. 688; *Saxton v. Dodge*, 57 Barb. 111; *People v. Northern R. R. Co.*, 42 N. Y. 217; *Weaver v. Barden*, 49 id. 286; Code, §§ 149, 159; *Alcott v. Carroll*, 39 N. Y. 36; *Newell v. Doty*, 33 id. 83; *Wayland v. Tysen*, 45 id. 281; Const., art. 1, § 2; *Ward v. Waterhouse*, 2 Rob. 653; *Bryant v. Bryant*, id. 612; *Juniata Bank v. Hale*, Redf. & B. Lead. Cases, 423; *Murson v. Hall*, id. 290; *Corn. Ex. Ins. Co. v. Babcock*, 42 N. Y. 613; *Phillips v. Wicks*, 14 Abb. N. S. 380. The order is appealable. *De Barante v. Deyermant*, 41 N. Y. 355; *Foote v. Lathrop*, id. 358; Laws 1870, chap. 741; Code § 11, subd. 4.

*Theo. F. Jackson*, for respondents. The order was not appealable. Appeal should have been taken from the judgment entered thereon. Code, § 349; *Witherhead v. Allen*, 28 Barb. 661; *King v. Stafford*, 5 How. 30; *Joannes v. Day*, 3 Rob. 650; *Hollister Bank v. Vail*, 15 N. Y. 593; *Briggs v. Bergen*, 23 id. 163. The answer of Robert Fincke was clearly frivolous. *Edwards v. Lent*, 8 How. 28; *Hance v. Rummig*, 2 E. D. Smith, 48. So was that of *Wilhelmina*. If the answer does not establish a good defense, the order should be sustained, although the answer is not frivolous. *Martin v. Kanouse*, 2 Abb. 328; *East River Bank v. Rogers*, 7 Bosw. 494.

GILBERT, J. It is a sufficient answer to the objection, that the appeal ought to have been from the judgment, to say, that it does not appear that any judgment has been entered. If such be the fact the respondent could avail himself of it only by motion to dismiss the appeal.

Upon the merits, we think the order, so far as it affects the

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female defendant, was erroneous. Her answer puts in issue the averment of a demand of payment and notice of non-payment of the note, and avers that her indorsement was procured while under duress. These are substantial defenses and must be tried.

The answer of the other defendant is frivolous.

The order must be reversed as to the defendant Wilhelmina Fincke, and affirmed as to the other defendant without costs.

*Ordered accordingly.*

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GREEN V. EDEN, appellant.

*Landlord and tenant — covenant to repair — what repairs are.*

In a lease the lessee covenanted to keep the leased building in good repair and condition. At the time he took possession the roof and steps were in bad condition. The lessee made such repairs only as were required for his own comfort, and the steps became rotten and the roof leaked so as to injure the walls. After the lessee's term expired the lessor had the roof shingled, gutter repaired and new steps made. *Held*, that these were repairs within the covenant of the lease, and that the lessee was liable for the expense of making them.

APPEAL from a judgment of the Kings county court, entered upon the verdict of a jury in an action originating in a justices' court. The facts appear in the opinion.

*H. C. Place*, for appellant.

*W. J. Dainty* and *D. P. Barnard*, for respondent.

BARNARD, P. J. The facts in this case are not disputed. The plaintiff leased to the defendant her premises for the term of three years, at a specified rent in money; the defendant also covenanting, "as and for a further rent, to keep the whole of said house and premises in good repair and condition during the said demised term." The roof was in bad condition when the defendant entered into possession under the lease, as also were the steps to the house. The defendant made such repairs as were needed for "our own comfort." The roof leaked during the term and injured the walls and building. The plaintiff, after the termination of the lease, par-

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tially shingled the roof and replaced the gutter, and made new steps to the house. The cost was \$102.80. The county judge ordered a verdict for this sum.

As there was no question of fact, the only question arising upon this appeal is one of law. Was the work done to the roof, gutter and steps a repair? We think clearly it was. The covenant to keep the house in good repair and condition was not performed by leaving a leaky roof to the house, so that the rain penetrated the building and injured it and its contents; nor by leaving a rotten gutter which would not do its work; nor by leaving steps so rotten as not to be safe to use.

The judgment should be affirmed, with costs.

*Judgment affirmed.*

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CHURCH V. MILLER, appellant.

*Costs—on trial in county court of justice's court action.*

In an action in a justice's court, plaintiff claimed \$50, and defendant set up a counter-claim for a like amount. The justice rendered a judgment in favor of defendant for his counter-claim, from which plaintiff appealed. Upon a new trial in the county court, the jury rendered a verdict of no cause of action on the part of plaintiff, but did not find in favor of defendant's counter-claim. *Held*, that defendant was bound to make no offer and was entitled to costs in the county court.

APPEAL from an order made by the county judge of Orange county, striking the defendant's costs, as taxed by the clerk, from a judgment of the county court, entered upon the verdict of a jury, and inserting therein costs in favor of the plaintiff.

The action originated in a justice's court. In the pleadings, plaintiff claimed \$50 for house rent, and defendant set up as a counter-claim a demand of \$50 and interest, for work, labor and services. The justice rendered judgment in favor of the defendant for \$50 and costs. From this judgment plaintiff appealed to the county court, asking for a new trial. No offer was made by the defendant.

In the county court, the cause being tried with a jury, they rendered a verdict of no cause of action, and both parties claimed

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costs. The clerk taxed the defendant's costs, and judgment was entered accordingly. On motion of plaintiff, the county court ordered the defendant's costs stricken from the judgment and plaintiff's costs inserted, from which order defendant appealed.

*B. R. Champion*, for appellant.

*Sharpe & Winfield*, for respondent.

BARNARD, P. J. The sole question presented is as to which party is entitled to costs.

The action was brought by plaintiff against defendant in a justice's court. The plaintiff asked a judgment for rent, and the defendant set up a counter-claim for work and labor. The defendant obtained judgment against the plaintiff for \$50, besides costs. The plaintiff appealed, claiming a judgment in his favor of \$50. The case was tried in the county court of Orange county by a jury, and a verdict rendered of no cause of action. The county judge has, by order, given costs to the plaintiff, and the defendant appeals.

The question of costs is to be determined, without regard to any question of offer made or omitted to be made. The case indisputably is one where the defendant was bound to make no offer.

The defendant was the prevailing party, and is entitled to costs by reason thereof, unless he falls within an exception or limitation created under section 371 of the Code.

The learned county judge says the judgment was wholly reversed. I do not think it was. The justice's judgment established two things: 1st, that plaintiff had no claim against defendant; 2d, that the defendant has a claim of \$50 against the plaintiff.

The plaintiff appeals and claims what he claimed before the justice, namely: a judgment in his favor against the defendant of \$50 or over. The new trial in the county court established two things: 1st, that plaintiff had no claim against defendant; and 2d, that defendant had none against the plaintiff. It was not an entire reversal of the justice's judgment. That part of it which destroyed the plaintiff's claim was upheld. If the justice's judgment had been simply for the defendant, destroying the plaintiff's claim, and the plaintiff had appealed, there would be no question as to defendant's right to costs. When the defendant's rights are not affected by the question of offer, I cannot see how he can cease to be the pre-

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vailing party. He has not prevailed, it is true, to establish his own claim; but he has prevailed to destroy the plaintiff's claim, and, thus far, his judgment before the justice was not reversed.

*Order reversed.*

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FANNING V. LONG ISLAND RAILROAD COMPANY, appellants.

*Railroads—defective fences. Negligence. Evidence.*

A railroad company had not fenced their road at plaintiff's farm crossing, in accordance with the statutes. *Held*, that the company was liable for the loss of a steer which had passed in upon the company's track at such crossing, and was killed by one of the company's passing trains, and this liability did not depend on any consideration of negligence on the part of either party.

This question was asked, "Where was the steer when the train struck him, as indicated by the marks on the ground and track?" *Held*, proper, and calling for a fact and not an opinion.

APPEAL from a judgment of the Suffolk county court, affirming a judgment of a justice's court.

The action was for the killing by one of defendant's trains of a steer belonging to the plaintiff. By the evidence it appeared that the defendant's railroad runs through plaintiff's farm. There was, on the 30th of July, 1867, a fence on each side of the railroad, across the farm; but at a certain lane which ran through the farm and across the railroad, there was neither fence, gate or bars, nor cattle-guards. It was shown that at that point, gates or bars were necessary for plaintiff's use. On the day mentioned, about sundown, plaintiff's steer, which had wandered through this lane and on to defendant's track, was struck by a passing train and killed. The evidence of these facts were tracks, which appeared to have been made by the steer, and the circumstances that the locomotive of an evening train gave a signal to put down the brakes, and the dead body of the steer was found the following morning alongside defendant's track with marks indicating a collision with a train. On the trial in the justice's court, the jury found a verdict in favor of the plaintiff for \$60, and interest from August 1, 1867.

The defendant appealed to the county court, on questions of law only. The judgment of the justice was affirmed, and from the judgment of the county court this appeal is taken.

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*William Wickham*, for appellant.

*D. W. Reeve*, for respondent.

BARNARD, P. J. The defendants were liable for the killing of the plaintiff's steer, if they did kill it, because they had not fenced their road, "with openings or gates or bars therein" at the plaintiff's farm crossings, and had not constructed cattle guards sufficient to prevent cattle from getting on to their railroad. Laws of 1850, chap. 140, § 44; Laws of 1854, chap. 282, § 8; *Staats v. H. R. R. Co.*, 3 Keyes, 196; *Corwin v. Erie Railway*, 13 N. Y. 42; *Tracy v. T. & B. R. R. Co.*, 38 id. 433.

The liability does not depend upon any consideration of negligence of defendant, or contributory negligence of plaintiff.

We think the evidence sufficient to show that the defendant's locomotive killed plaintiff's animal.

The train was heard to brake up late in the afternoon, at the place where the animal was found dead the next morning, on the north side of defendant's track, where marks in the dirt indicated that the steer had been dragged along after being struck. Blood was found on the north rail, and on the cross ties.

The plaintiff was, under objection, permitted to ask this question: "Where was the steer when the train struck him, as indicated by the marks on the ground and track?"

This question called for a legitimate fact, and not for the opinion of the witness.

The judgment should be affirmed, with costs.

*Judgment affirmed.*

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PEOPLE *ex rel.* SUPERVISORS OF RICHMOND COUNTY, appellants, *v.*  
HOPKINS, Comptroller.

*Statute construction—Laws of 1870, chap. 429; 1855, chap. 427—unpaid taxes—collection of—impracticable statute not void.*

By chap. 454, Laws of 1860, and acts amendatory thereto, sales of lands for unpaid taxes in Westchester county are required to be made at the courthouse in Westchester county, and personal notice of such sale given to mortgagees residing in Westchester and adjoining counties. By chap. 429, Laws of 1870, the acts relating to Westchester county are made applicable to Rich-



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mond county. *Held*, that the meaning of the last-named act is that the sales shall be made at the court-house in Richmond, not at that in Westchester county, and the notices given personally to residents of Richmond and adjoining counties.

*Held*, also, that even if the intention of the act was to have the sales take place in Westchester it would not render the act nugatory. The court cannot annul a statute merely because its execution is difficult, or a literal interpretation would produce impracticable results.

The legal effect of the act of 1870 (chap. 429) is to supersede as to Richmond county the act of 1855 (chap. 427).

APPEAL from an order of the special term denying an application for a mandamus.

The application was made for a mandamus to the comptroller of the State, requiring him to examine the returns of unpaid taxes in Richmond county, sent to him, and to credit the county treasurer of said county with arrears admitted by him. Such application was based upon the provisions of the Laws of 1855, chap. 427, title I, §§ 4, 5, 6, 9, which impose upon the comptroller the duty upon certain returns, certificates and affidavits, being transmitted by a county treasurer to him to credit such county treasurer "with the amount of all the arrears of taxes which shall be admitted by him" (§ 9).

The comptroller refused to make such credits, claiming that the act in question was repealed as to Richmond county by chap. 429 of the Laws of 1870. This last-named statute merely applies the provisions of certain acts in relation to the collection of unpaid taxes in Westchester county (Laws 1860, chap. 454; 1861, chap. 81; 1863, chap. 430; 1868, chap. 239), to Richmond county.

By the acts in relation to Westchester sales of lands for unpaid taxes, are required to be made by the county treasurer, "at the court-house, in the town of *White Plains*." It is also provided, that personal notice of the tax sales shall be given to any mortgagee of the property to be sold, "if a resident of *Westchester county* or a county adjoining thereto, or if he be not a resident, upon the owner if a resident of *Westchester* or an adjoining county, and by depositing a notice in one of the post-offices of *said county*."

The questions raised were, does the act of 1870 require that the sales of lands for unpaid taxes in Richmond county shall be made in Westchester instead of Richmond county, and do the provisions as to notices apply to residents or non-residents of Westchester

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county, and if so, is not the act inoperative and void by reason of the impracticability of its provisions?

*Tompkins Westervelt*, for appellants.

*Isaac V. French*, for respondent.

GILBERT, J. If the act of 1870 (chap. 429) is valid and operative, the legal effect of it was to supersede the act of 1855 (chap. 427). The appellants contend that the act of 1870 is inoperative and void, for the reason that it requires the sales for taxes to be made in the county of Westchester, and that the provisions relating to the service of notices are applicable only to residents of that county. If such were the only meaning of which the act was susceptible, it would not follow that the act should be annulled, for it would be the duty of the court to put a construction upon the act, and give it effect accordingly. The court cannot annul a statute, otherwise valid, because the execution of its provisions would be difficult, or because a literal interpretation thereof would produce impracticable results. On the contrary, it is the duty of the court to give to the statute such a meaning as will carry out and effectuate to the fullest extent the intention of the legislature. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound the words in their natural and ordinary sense. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute. 1 Kent's Com. 462.

The statute under consideration provides, that the act to authorize the sale of lands and for the collection of unpaid taxes in the county of Westchester, passed April 16, 1860, and the several acts amendatory thereof "be amended so that the provisions of said acts shall apply to the county of Richmond as well as to the county of Westchester."

The meaning of this statute is very obvious, and there is no practical difficulty in giving it full effect. The sales for taxes are to be made at the court-house in the county of Richmond. Personal notice of such sale must be given to a mortgagee if a resident of Richmond county, or a county adjoining that county, or if he be not a resident, then to the owner, if he be a resident of Rich-

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mond county or of a county adjoining thereto, and to the mortgagee by depositing a notice to him in one of the post-offices of Richmond county. In this way the acts relating to Westchester county can be applied to the county of Richmond, and the act of 1870 amends them accordingly. The amendment is co-extensive with the object the legislature intended.

We are of opinion, therefore, that the action of the comptroller was proper, and that the order appealed from should be affirmed, with costs.

*Order affirmed.*

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TOMPKINS V. LEE, appellant.

*Partnership—transactions in real estate—verbal agreement—rights between partners.*

Plaintiff claimed to have loaned defendant certain moneys for which he brought action. Defendant claimed that the moneys had been advanced by plaintiff in a partnership agreement made verbally for the purchase of and sale of particular lands. The lands in question had been purchased by defendant, and a deed taken in his own name two months before the money was received by him. *Held*, that, even if the money was advanced upon a partnership agreement, it being verbal, plaintiff had no interest in the lands and might recover the sum advanced in an action therefor.

APPEAL from a judgment in favor of plaintiff entered upon the report of a referee.

The action was brought to recover the sum of \$3,500, and interest, from the 4th day of January, 1869, for moneys alleged to have been loaned by the plaintiff to the defendant. The defendant alleged that he and the plaintiff had formed a copartnership to purchase certain real estate in Fordham, and that the money was not to be repaid until the property was sold, when each party, after having first received seven per cent interest upon his advance, should receive in addition one-half of the profits. The property has not been sold, and the defendant claimed that the action at least was premature. The defendant also set up usury; but, at the trial, said that it was not his wish that usury should be pleaded, and no evidence was given upon the subject.

It was admitted that about January 4, 1869, plaintiff delivered to defendant the sum of \$3,500, and that in some manner plaintiff

was to have some return for his money. Nearly two months previous to this time defendant had purchased the real estate mentioned, and had taken deeds in his own name. It was claimed by defendant that the partnership agreement was verbally made previous to the delivery of the money; but defendant admitted that he had made the contracts for the sale of the property to himself before any conversation took place upon the subject between him and plaintiff, and that plaintiff did not see the property until after defendant had received the deeds for it in his own name.

There was a memorandum book containing certain entries by defendant, in which it was stated that the property was bought jointly, and which defendant testified plaintiff had seen, and had not objected to. There was also a receipt, which was signed by defendant, and about a month after the transfer of the money given to and retained by plaintiff, in which it was stated that defendant had received from plaintiff \$3,500, to be paid back with interest when the property in Fordham was sold, "with one-half of any profits I may make in selling such property." It was on both sides, however, claimed that this receipt did not express the terms of the agreement, defendant stating that it was only given as a temporary document, and plaintiff explaining that he took it because he wished some evidence that defendant had received the money, and kept it because defendant would not give him any thing better.

The referee found that the transaction was a loan, and gave judgment for plaintiff for the amount advanced.

*George W. Van Slyck*, for appellant.

*Morris F. Dowley*, for respondent.

BARNARD, P. J. The plaintiff is entitled to recover, unless the defendant shows some right by which he can retain the \$3,500 which he received from the plaintiff.

The defendant attempts to do this in two ways: 1st. The parties were partners in the purchase of the real estate at Fordham, and the money in question was plaintiff's capital. This claim is negatived by the fact that the property was purchased by defendant before the receipt of the money, and a deed was taken in his own name. There was no written agreement of partnership; and even if the defendant promised to receive plaintiff as a partner, and

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defendant promised to become a partner, and to that end advanced the money in dispute, these facts would give plaintiff no interest in the land. The memorandum in the blank book is not signed, and the receipt neither discloses nor evidences a trust in the land. If this receipt was accepted, it did not "show his (plaintiff's) interest," which defendant says he agreed to do when he applied for the money, as he testifies. So that, if the receipt was accepted, it gives to defendant no right to retain plaintiff's money.

The referee has found that the receipt was not accepted, but that the contract between the parties was for a loan, and that the receipt did not evidence the transaction. I cannot entirely assent to this finding as being the transaction between the parties. It seems plain that the parties agreed to go into partnership by parol.

The partnership would be good, based on participation in profits alone. *Manhattan Brass Co. v. Sears*, 45 N. Y. 797. The receipt did not certainly evidence the transaction, in that it did not disclose the right of plaintiff in the property.

The defendant having received the plaintiff's money under an agreement which he has failed to perform, the plaintiff is entitled to recover it back. I know of no other remedy he has but this action.

*Judgment affirmed.*

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SMITH, appellant, v. LEE *et al.*

*Title — to deposits. Pleading — demurrer.*

D. deposited money with defendant in the name of "D. for C.," and took a note payable to "D. for C." *Held*, that this was a complete change of the title to the money. D. became a trustee for C., and after the death of D., a complaint in an action in equity by C. to obtain possession of the money, setting forth the above facts, was not demurrable.

APPEAL from an order of the special term sustaining a demurrer to the complaint.

The complaint is in the nature of a bill in equity, and alleges substantially as follows:

That on or about the 1st of September, 1864, one David P. Smith, since deceased, deposited with the defendant, Albert G. Lee, the sum of \$2,234.48, which he directed the said Lee to enter upon

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his book in the name of "David P. Smith for Chas. F. Smith," who is the plaintiff in this action, and to make his (Lee's) note therefor payable a year after date, to the order of "David Smith for Charles F. Smith," which was done. That said note was renewed and a new note in the same form made each year, adding in the accrued interest, until the 11th of September, 1871, when the principal and interest amounted to \$3,142.44, for which sum said Lee made the note upon which this action was brought; that the note was in the possession of said David P. Smith at the time of his death, which took place August 18, 1872, and now is in the possession of William E. Cornell and Phebe T. Smith, the administrator and administratrix of the estate of said David P. Smith. That at the time the deposit was made with said Lee, said David P. directed the account to be kept separate from that of other moneys at the same time deposited by him with said Lee, and the account was kept separate up to the time of the death of said David P. Smith.

The complaint asked the court to decree that the administrators surrender to plaintiff the said note, and that the said Lee pay to him the amount due, with such other relief as might be just.

The defendant Lee answered, admitting the material facts in the complaint, but asking that the complaint be dismissed upon the ground that neither the money nor the notes mentioned had ever come into possession of the plaintiff.

The defendants Cornell and Phebe T. Smith demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

At the Kings special term, September, 1873, the demurrer was sustained, Mr. Justice PRATT holding that "David P. Smith's dominion and control of the funds deposited never ceased; hence, there was no valid gift *inter vivos*."

Jos. P. Osborne, for appellant.

, for respondent.

BARNARD, P. J. I think the court erred in sustaining the demurrer. The plaintiff avers facts sufficient to sustain his title to the note in question.

David P. Smith, deceased, deposited the money for which the note was given with defendant in the name of "David P. Smith for

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Charles F. Smith," and took a note payable to deceased for plaintiff. This was a complete change of the title to the money. The deceased became a trustee for plaintiff, and, although the promise was made by Lee to pay the same to deceased, it was to him as trustee for the plaintiff.

The judgment should be reversed, and the demurrer overruled, with leave to defendant to answer over on payment of costs.

*Judgment accordingly.*

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HAYES, appellant, v. ADAMS.

*Wrongful conversion — what is not.*

The holder of a promissory note, claimed to have been made by a deceased person, but which was disputed by the representatives of the alleged maker, placed it in the hands of M., to be negotiated for such amount as he could get from those interested in the estate. A daughter of the alleged maker paid M. a small part of its face value and received the note, which she handed over to the executors of her father's estate. *Held*, that such daughter did not wrongfully convert the note.

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee.

The action was brought for the alleged conversion of a promissory note for \$5,000, dated September 14, 1864, payable on demand, with interest, to the order of Nellie Taylor, plaintiff's mother, and purporting to be made by one A. Throckmorton, of Louisville, Kentucky, defendant's father. The action was referred and tried before a referee, who found, in substance, the following facts :

Mrs. Nellie Taylor had, on and prior to the year 1864, in her possession a sum of money belonging to the plaintiff, who then, and until November 20, 1870, was under twenty-one years of age. During such time, said Nellie Taylor was the natural guardian of the plaintiff (who had no statutory guardian), her father being dead.

About September, 1864, said guardian loaned out of said money, to A. Throckmorton, of Louisville, Kentucky, \$5,000, and took his promissory note therefor, which he made in the city of New York. Said note was payable on demand to Nellie Taylor or order.

Some time in or before the year 1868, said Nellie Taylor placed

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said note, indorsed by her, in the hands of one Miner, with authority to obtain such amount as he might be able from the representatives or kindred of the maker, and upon obtaining such amount to surrender the note. Said Miner, under his authority, received from defendant, a daughter of the maker, \$1,500 of her own money, which she paid in satisfaction of the note, which was thereupon given up to her and by her surrendered to the executors of the maker.

The referee found, as a conclusion of law, that the note was not wrongfully converted by the defendant to her own use, and dismissed the complaint.

It was claimed, on the part of the plaintiff, that the note was put in Miner's hands for the sole purpose of enabling him to show the same to a son of the maker and convince him of its genuineness; that the note was not indorsed by Nellie Taylor, but was indorsed by Miner without authority, and passed to defendant for \$1,500, which she paid in behalf of her father's estate in full satisfaction of the note, and that she received credit from the estate for the advance.

*W. I. Butler*, for appellant.

*Thomas L. Snead and James Clark*, for respondent.

BARNARD, P. J. We think the referee is fully sustained in his finding, that the plaintiff's mother, Mrs. Taylor, indorsed the note in question, and delivered it to Miner, to be negotiated for such amount as he could get from the persons interested in the estate of the deceased maker. Miner got the note from her without dispute. The note was questioned by the children of the maker. To establish the genuineness of the note, Mrs. Taylor got a sworn certificate from a Mr. Corbiere, that he saw the note delivered; and also made a sworn statement of her own as to its genuineness. Miner offered the note to a son of deceased for \$2,000, which was declined; and subsequently offered to take \$1,500. The defendant, who was a daughter of deceased, gave him her check payable to his, Miner's, order for that sum; and upon Mrs. Taylor's and Miner's indorsement, took the note and delivered it to defendant. Mrs. Taylor's counsel wrote, at Mrs. Taylor's request, to the executor of deceased, that Mrs. Taylor gave the note to Miner "to be negotiated."



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The evidence throws a strong suspicion on the claim itself. A minute examination of Mrs. Taylor's and Mr. Corbiere's testimony will certainly produce that result. That question, however, is not presented by this appeal, and is not important, except to furnish a reason why \$1,500 was accepted for an apparent claim of \$5,000.

It was not erroneous to permit Mrs. Taylor to write her name on the referee's minutes by consent, and the evidence could be made legal by an agreement between the parties.

The signature was made "for the purpose of comparison" by the referee. The evidence is sufficient to sustain the finding, with the other testimony in the case.

I see no objection to the admission of the sworn certificate of Mrs. Taylor—her handwriting to it is proven, and the county clerk's certificate establishes the genuineness of that of the notary.

The proof of the notary's handwriting by comparison was immaterial.

The defendant, by her payment of \$1,500 on her own account, became the legal owner of the note. Her subsequent surrender of it to her father's executors, as paid, did not change her rights as against the plaintiff. As to her, the defendant owned the note.

Upon the whole case, the judgment should be affirmed, with costs.

*Judgment affirmed.*

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SUTTON *et al.* v. CAMPBELL, appellant.

*Sale of personal property—delivery.*

Defendant agreed to manufacture and deliver to plaintiffs two printing presses, and take in part payment therefor an old press. One of the presses was delivered, and the amount due for both, after deducting the value of the old press, paid. The old press was not delivered to defendant, although plaintiffs were ready and willing to deliver it. *Held*, that the title to the new press, undelivered, had not vested in plaintiffs so as to entitle them to maintain an action against defendant for its possession.

APPEAL from a judgment for \$5,000 in favor of plaintiff, entered upon the verdict of a jury at the Kings county circuit, and from an order denying a motion for a new trial.

The action was brought by the plaintiffs, James Sutton and

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Lindley M. Franklin, to obtain the possession of a printing press of the value of \$5,000. In March, 1871, plaintiffs and defendant, Andrew Campbell, made a verbal agreement for the manufacture, by defendant, of two printing presses at the price of \$10,000. Defendant was to accept in payment an old press, and the balance was to be paid in cash. At the time, an order was given in writing. Subsequently, in May of the same year, another conversation was had between the parties, at which time a bill was made out, in substance as follows:

"James Sutton & Co. to A. Campbell, Dr. : May 13, to one No. 2 combination press, to be delivered by the 21st inst., \$5,000; also, one No. 2 combination, to be delivered in August, \$5,000 — \$10,000."

There was credited upon this bill \$2,500 under date of May 13, which sum was paid on that day. On the 17th of June \$2,500 more was paid upon the bill.

It was agreed that the defendant should advertise in the *Aldine*, a newspaper published by plaintiffs, to the extent of \$2,000, and should take in payment of the remainder an old printing press belonging to plaintiffs.

The first of the presses was finished and delivered to the plaintiffs; the second was finished and, with consent of plaintiffs, put on exhibition at the American Institute fair, in the fall of 1871, by defendant. The old press was never delivered to defendant. Plaintiffs, after demanding the press ordered, brought this action therefor, alleging the publication of the advertisement of defendant in the *Aldine*, and their readiness to deliver the old press to defendant.

*James W. Culver*, for appellant.

*Robert Sewell*, for respondents.

BARNARD, P. J. The appellant presents in his argument of this appeal but one question. The action was one for the delivery of personal property by defendant to plaintiffs. Defendant had made a printing press for plaintiffs. Evidence was given that the defendant had been paid in full all the cash he was to receive, and that there only remained an old press, which defendant was to take of plaintiffs, in full for the balance of the contract price. The court charged the jury that if the full contract price was paid, so far as it could be paid up to the time when the machine was to be delivered, then it was entirely immaterial whether there was an actual

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delivery of the press or not; that, as between the parties, a delivery was not necessary to vest the title in the plaintiffs.

I think this proposition cannot be sustained under *Andrews v. Durant*, 11 N. Y. 35. That case lays down the rule, after an extensive examination of the cases, that, under a contract to build a vessel or other thing, no title vests in the party for whom it is agreed to be built until it is finished and delivered, or at least ready for delivery, and approved by such party.

The case of *Macklin v. Mangles*, 1 Taunt. 318, which is cited with approval by both of the learned judges who write the opinions in the court of appeals, holds that a completed barge, all paid for, and with the name of the person for whom it was built painted on the stern, but which had not been delivered, belonged to the builder.

The judgment should be reversed and a new trial granted, costs to abide event.

*Judgment accordingly.*

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BUSH v. ROMER *et al.*, appellants.

*Common carrier — delivery by to wrong person.*

Defendants, common carriers, delivered by mistake, to a person who had no authority to receive them, goods shipped by and consigned to plaintiff. Held (following *Viner v. N. Y. Steamboat Co.*, 50 N. Y. 24), that they were liable to the plaintiff for the value of such goods. 31

APPEAL from a judgment of the Dutchess county court upon the verdict of a jury in favor of the plaintiff, in an action originating in a justice's court.

The defendants, William F. Romer and Jacob Tremper, were, in the spring of 1873, common carriers, doing business under the firm name of Romer & Tremper, and running a line of steamers between Albany and Newburgh, on the Hudson river, stopping at intermediate places, of which Hyde Park was one. Plaintiff, John W. Bush, who was a dealer in trees, on the 25th of April, 1873, shipped, at Waterloo, N. Y., a box of trees, of the value of \$140.10, marked "J. W. Bush, Hyde Park, N. Y., by steamer *Eagle*, from Albany." This box was received on board the steamer named, which was one belonging to defendants' line, April 30, 1873, and landed at Hyde

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Park the same day. A few days afterward the box was delivered by defendants' agent having charge of their business at Hyde Park, to one Witherwax, who had no authority from plaintiff to receive it.

*A. Wager*, for appellant.

*H. H. Morse*, for respondent.

BARNARD, P. J. This is a plain case. The defendants are common carriers. As such, they undertook to transport for the plaintiff, from Albany to Hyde Park, a quantity of trees, and deliver them to the plaintiff there. They did not so deliver them; but did deliver them to a Mr. Witherwax, who had no authority to receive them for the plaintiff. Under this state of facts, the plaintiff is entitled to recover the value of the trees.

The case of *Viner v. New York, etc., Steamboat Co.*, 50 N. Y. 23, is a decisive authority. That case holds, that the liability of the carrier continues until the property is delivered according to the consignee's order; and it is no answer for a wrong delivery to say, that it was done by mistake, and with no bad intent. The judge who tried this case charged in the language of that case, and the defendants excepted to it; and it is claimed in the points by the defendants, that it was in effect directing a verdict for the plaintiff. It is, notwithstanding its effect, a legal charge. No question is raised as to the freight in the pleadings, and none was suggested on the trial.

The judgment should be affirmed, with costs.

*Judgment affirmed.*

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BARNEY V. OYSTER BAY AND HUNTINGTON STEAMBOAT COMPANY, appellant.

*Common carriers—right to exclude person conducting express business on passenger boat.*

Plaintiff insisted upon carrying on an express business upon defendants' passenger boat, carrying a carpet bag containing express packages sent between the places where the boat ran, and also taking orders while on the boat for the delivery of passengers' baggage. *Held*, that the ejection of plaintiff from defendants' boat, for persisting in the transaction of his business, and

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the subsequent refusal of defendant to carry plaintiff otherwise than as a passenger, were justifiable. *Barney v. Steamboat Martin*, 8 Alb. Law Jour. 54, followed.

APPEAL from a judgment in favor of plaintiff, for \$628.27, entered upon the verdict of a jury at the Suffolk circuit, and from an order denying a new trial.

The action was brought to recover damages—1st, for having been ejected from defendant's steamboat, the *D. R. Martin*, on the 23d day of October, 1871, at Jones' dock, near Huntington, Suffolk county; and, 2d, for having been refused passage on the same boat on the 27th of the same month at New York city.

The plaintiff had been formerly a regular expressman on board of this boat under contract with defendant between Huntington and the city of New York, but before the dates above mentioned the contract had terminated, and the privilege of transacting this business on the boat was granted by defendant to another party.

The plaintiff, however, contrary to the wishes and directions of defendant, continued to advertise and transact his business as before. This business consisted in part in receiving orders on board of the boat from passengers for the delivery of their baggage when they arrived at the end of their route; in taking charge of such baggage and receiving pay therefor.

At the time of the plaintiff's ejection from the boat at Jones' dock, he had, as he testified, in his possession a ticket for passage on board the boat, which he had purchased and paid for on board. On the 27th of October, in the city of New York, plaintiff applied for passage and was told he might go as a passenger, but unless he would promise to do no express business he could not go on board of the boat.

Upon the first cause of action alleged, a former action was commenced in the United States district court, against the steamboat *D. R. Martin*. This action was tried and judgment rendered in plaintiff's favor, but this judgment was, on appeal to the United States circuit court, reversed. The decision, on appeal, is reported in 8 Alb. Law Jour. 54.

In the present action, plaintiff insisted that he had the right to carry on the express business on the boat as formerly, and that the defendant had no control over it. He also insisted upon carrying a carpet bag containing express matter free.

Both these claims were resisted by the defendant. The former

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action in the United States district court was plead in bar of the first claim in this action.

*Thomas Young*, for appellants.

*J. M. Guiteau*, for respondent.

BARNARD, P. J. I think the justice at circuit erred in not nonsuiting the plaintiff. There was but a single cause of action for which plaintiff asked damages, and that was for a refusal to carry plaintiff on the 27th of October, and subsequently, "so long as he (plaintiff) transacted the business he was engaged in, to wit: His express business." The evidence of the plaintiff clearly shows, that his claim was to travel as an expressman on the defendant's boat. This he had no right to do. *Barney v. Steamboat D. R. Martin*, opinion by Judge HUNT, 8 Alb. Law Jour. 54.

The plaintiff in his complaint does not complain that he was refused as a passenger.

He does not claim it as a witness upon the trial. If he did, the evidence is overwhelming that such is not the fact. If it was right to send the case to the jury, their verdict was against the evidence.

Judgment reversed, and new trial granted, costs to abide event.

*Judgment accordingly.*

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RUGGLES, receiver, etc., v. CHAPMAN, Superintendent, etc., appellant.

*Insurance department—funds deposited with superintendent—when receiver of company is not entitled to.*

In an application by the receiver of a life insurance company, for an order directing the superintendent of the State insurance department to assign the funds deposited with him by the company for the security of policy holders, in order to enable the receiver to resist suits for disputed claims, *held*, that there is no provision of law for withdrawing the securities in the hands of the superintendent for such a purpose.

APPEAL from an order of the Kings special term, held November 7, 1873, appointing plaintiff a special receiver of funds in defend-

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ant's hands, deposited by the Eclectic Life Insurance Company for the benefit of its policyholders.

Defendant was superintendent of the insurance department of the State, and held the funds in question under the provisions of the statutes requiring deposits from insurance companies doing business in the State. Plaintiff was appointed receiver of the company named by the New York court of common pleas, in an action to wind up the affairs of said company. At the time of his appointment many suits on policies were pending against the company in different States. The company alleged that they were for fraudulent claims, and was defending them in the ordinary course of its business. It was claimed by the receiver that there were no available assets to defend these suits, not even to get witnesses and experts for trials. The receiver had requested the delivery of the funds deposited in defendant's hands, which consisted of bonds, mortgages and other securities, and upon refusal by defendant to deliver, had applied for a mandamus, which had been refused by Mr. Justice FANCHER.

The plaintiff then commenced this action for the purpose of having the rights of the parties adjudged, and asked for a preliminary appropriation of a part of the fund in defendant's hands to prevent the impending danger of defaults in the suits.

On the 7th of November, 1873, an order was made by Mr. Justice PRATT, at the special term of this court, appointing plaintiff a special receiver, and directing the defendant to execute and deliver to said receiver assignments of the securities held in defendant's hands. From this order, defendant appealed.

*Frederic H. Betts*, for appellant.

*John L. Hill*, for respondent.

BARNARD, P. J. There seems to be no need for the order appealed from. The securities held by the defendant, as superintendent, are safe in his hands, and should remain there until the case can be heard upon its merits. Whether this action is the proper remedy, or whether the funds held by defendant are or are not held specifically as security for the policyholders, are questions which must be decided by judgment. It is better that this judgment be made before the transfer of the securities.

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Upon the merits, I am inclined to think that the special deposit in the defendant's hands cannot be directed to be transferred to a receiver appointed by the court of common pleas of the city of New York. I think it cannot be used to defend actions upon policies which may be recommended by a referee and ordered by the court. No provision has been made by law to withdraw any portion of the securities in the defendant's hands, to be used in defending claims which are adjudged to be invalid.

I am in favor of reversing the order appealed from, with \$10 costs, to abide event.

*Order reversed.*

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WATERS, appellant, v. CRAWFORD.

*Landlord and tenant — redemption by tenant after removal. Equitable relief.*

S. leased from defendant, premises for a term of ten years, but was removed before the expiration of five years, for non-payment of rent. The plaintiff as receiver of S., within a year after delivery of the premises to the landlord, sought to redeem under the statute (Laws 1842, ch. 240), and for that purpose tendered fifty dollars, claiming that that sum together with the rents received by the landlord, while in possession, from the sub-lessees of S., was sufficient to pay all rent in arrear and all costs and charges incurred by the landlord. The landlord refusing to restore the premises, plaintiff brought this action, setting out in the complaint the foregoing facts, and asking that he be restored to possession and for general relief. The court below treating the action as simply one for possession, held the tender insufficient, and rendered judgment for defendant. *Held*, error; under the prayer for general relief the plaintiff was entitled to an accounting.

APPEAL by plaintiff from a judgment of the special term in favor of the defendant.

This was an action in equity brought by the plaintiff as receiver of the property of James K. Spratt, under an order after return of an execution unsatisfied. Spratt leased premises in New York from defendant, for the term of ten years commencing May 1, 1866. In February, 1871, Spratt was removed from said premises by summary proceedings for non-payment of rent, and the defendant put into possession. The unexpired term exceeded five years, and, after the defendant had been in the receipt of the rent for six months, and



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before the expiration of six months from the execution of the warrant, the plaintiff attempted to redeem under the provisions of Chapter 240, Laws 1842, claiming that rents collected by the defendant had paid up all the rents due from plaintiff.

This action was brought to have the defendant restrained from acting as landlord of said premises and to have a decree that plaintiff had properly redeemed the same, and that he be put into possession thereof and for general relief. The plaintiff alleged that defendant had received the rents of the premises since Spratt's removal, amounting to the sum of \$1,630, and that the rent accruing under the lease to Spratt and the back rent for the non-payment of which Spratt was removed, together with the cost of the proceedings, were less than that sum; but that the plaintiff, to be more certain, had tendered to defendant fifty dollars and had asked to be allowed to redeem and to be let into possession, which was refused.

The following is the essential part of the judgment at special term, per INGRAHAM, J.:

"I am of the opinion that, under this section (Laws 1842, chap. 240), the lessee or his representatives, must tender all rent in arrear to the time of such payment or tender, and the costs and charges of obtaining possession. There is nothing in the statute which provides for a reduction of the rent in arrear by crediting rents subsequently collected by the owner. What may be the liability of the landlord to account to the lessee after he regains the possession, is not necessary now to be decided, but it is not provided for in this statute that any such credit should be given before the lessee obtains the restoration of the lease.

The provision which allows the tender to be made to the parties, shows that it was not intended that any inquiry should be made as to these credits. He could know from the lease the rent in arrears, and also the amount of costs before him on the proceedings. That he was authorized to receive, but he could not ascertain either the amount of rent collected afterward or the necessary amount of repairs thereon. Entertaining these views as to the proper construction of the statute, it is unnecessary to examine the items of rent claimed and credits to be allowed. If, however, the view I have taken of this construction of the statute be erroneous, and it should be held that the lessee is entitled to credit for the rents received, it could only be for the net receipts after deducting all expenses incurred in ob-

taining possession of the property, and for necessary repairs, and he would be entitled to interest.

This would include the costs whatever the landlord has to pay, and he would be entitled to deduct all expenditures made by him for that purpose. The evident intent of the statute under either construction of the section, is to make the landlord whole by receipt of all rent which had become due prior to the tender. Under either view, I think the tender was insufficient, and the defendants are entitled to judgment."

*H. Brewster*, for appellant.

*J. W. Hawes*, for respondent.

PRATT, J. The complaint is not in express terms a bill to redeem, yet it states the facts necessary for such an action, and in addition to the special relief prayed for, it contains the usual prayer for general relief.

Upon the whole case, as disclosed in the appeal papers, there is no reason to doubt the good faith of the plaintiff in his attempt to redeem, and upon the settled principle of equity, he is still entitled to a redemption upon such terms as may be just. It was, therefore, error at special term to treat the action as brought simply for the possession. An accounting between the parties should have been ordered. Could it be contended that the prayer for general relief is not equivalent to a special prayer for a redemption, yet the court had power to disregard the defect and render an appropriate judgment.

The divergent views entertained by judges of great experience place in a strong light the difficulties under which counsel for the plaintiff labored in determining upon his course, and show that this is not a case where an error should be severely punished. The court at special term seems to have proceeded upon the doctrine, that it had no power to regard this as an equitable action. This was error.

The plaintiff having made a new tender, embracing the amount supposed to be actually due the landlord, the complaint should be amended so as to embrace an absolute offer to pay that amount. Leave is given to the plaintiff accordingly, if he so elects, upon the payment of the costs prior to this appeal. On such election and

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payment of costs, judgment is reversed without costs of this appeal, and a reference ordered to try the issues, with instructions to the referee to take proof of all payments by any of the parties, and to state the account between them. A decree can then be made that will do equity.

*So ordered.*

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BIRDSALL, appellant, v. WILLIAMS.

*Practice — nonsuit — conforming pleadings to proof.*

The complaint set out a cause of action in trespass. At the trial it appearing that the fee of the *locus in quo* was in the defendant, and that plaintiff had only an easement, the judge dismissed the complaint. *Held*, that whether, under the circumstances, the complaint should have been dismissed, or the pleadings conformed to the proof, was largely in the discretion of the trial judge, and that, in this case, it would not be interfered with.

APPEAL from an order of the judge at circuit directing a dismissal of the complaint and judgment of nonsuit, and from an order of the special term denying a new trial, and refusing to set aside the nonsuit.

The complaint alleged that the plaintiff was the owner, and in possession of a mill, mill-dam, water-power and mill privilege; that the defendant, with intent, etc., "did, with a strong hand and with force, break and enter into and upon the close containing the said mill-dam," and did break and damage and destroy the said mill-dam, and thereby caused the water to flow into and upon the lands of said plaintiff, below the said dam, etc., for which wrongful acts the plaintiff demanded judgment for ten thousand dollars.

At the trial it appeared that the mill-dam in question was upon the premises of the defendant, and that the plaintiff only had the right to use the water gathered thereby. The judge dismissed the complaint, and ordered a judgment of nonsuit.

*Ralph E. Prime*, for appellant.

*I. T. Williams*, respondent, in person.

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PRATT, J. The complaint states a cause of action in trespass. The natural construction of the complaint would be that plaintiff was owner, in fee, of the mill-dam, and that the entry was illegal, aggravated by the destruction of the dam. On the trial it appeared that the fee of the dam was vested in the defendant, and that plaintiff was entitled merely to the use of the dam to gather water, with the right of free access thereto.

The cause of action proved was, therefore, not a trespass upon plaintiff's land, as averred in the complaint, but an injury to the plaintiff, resulting from the defendant's act upon his own property. The complaint did not contain the necessary averments to maintain any other action than that of trespass, and the plaintiff did not seek to have it amended. Whether, under the circumstances, the complaint should have been dismissed, or in case no surprise was shown, the cause should proceed, and the pleadings be conformed to the proof, was largely in the discretion of the judge at circuit. We are of opinion that his exercise of this discretion cannot be called unwarranted, and the order appealed from is, therefore, affirmed.

*Order affirmed.*

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BAKER, appellant, v. SCOTT *et al.*

*Contract — parol agreement to exchange lands. Statute of frauds.*

Plaintiff and defendants by parol agreed to exchange lands. Plaintiff conveyed his premises to defendants, who took possession, but refused to convey to plaintiff the lands owned by them. *Held*, that having performed his part of the agreement plaintiff was entitled to recover of the defendants the value of the particular consideration therefor withheld by them, and had a remedy in equity against them which was not defeated by the statute of frauds.

APPEAL from a judgment in favor of defendants in an action tried at special term. Sufficient facts appear in the opinion.

*William Henry Arnoux*, for appellant.

*Moody B. Smith*, for respondent.

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TAPPEN, J. The action is brought to recover the purchase or consideration money of a house and lot conveyed by plaintiff to defendants, and to have an equitable lien declared therefor. The defendants answer, that the defendants did purchase the premises from the plaintiff, who agreed to accept a tract of land in New Jersey in payment therefor; and further, that the plaintiff, as part of the terms, agreed to finish a house on the premises conveyed to defendants, and that the New Jersey land was to be conveyed to plaintiff on finishing the house, and not before; that plaintiff did not finish, and that defendants have finished the house, at an expense of \$262.19, and that the conveyance of the New Jersey land has been offered to the plaintiff, conditioned upon his paying the defendants the expense of finishing the house and some rent alleged to have been lost to defendants by delay in finishing.

On the trial, the court found the agreement to be for an exchange of lands, and not for the payment of any money as a consideration for the conveyance by the plaintiff; that there was no agreement by the plaintiff to finish the house, and that the agreement was, that the deed for the land in New Jersey should be delivered to plaintiff whenever called for, and rendered judgment dismissing the complaint, on the ground that there was no purchase-money due, and hence no equitable lien.

The entire agreement between the parties was in parol; it was executed on the part of the plaintiff, who now claims in this action, that being in parol he cannot compel the defendants to convey the lands they were to convey to him, and hence, that his only remedy is by an action for the unpaid purchase price.

The defendants both testified to a refusal to deliver the deed of such land to the plaintiff, because he had not finished the house, etc., but the court found against them, that there was no agreement on his part to finish the house, hence, when they refused to deliver him the deed, the plaintiff had a remedy in equity against them, which is not defeated by the statute of frauds. *Ryan v. Dox*, 34 N. Y. 307, and cases cited; 12 id. 364; 44 Barb. 162.

The agreement has been executed on the part of the plaintiff; the breach is on the part of the defendants; the defendants keep that which they received from the plaintiff, and refuse to make the compensation which he is entitled to; this compensation was in land, and they have without legal cause refused to convey it; hence the plaintiff may recover in damages the value of that which is due to

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him, and whether it be the value of the New Jersey land, or whether it be the sum in money of the consideration stated in the deed, less the mortgage assumed by the defendants, is a question not now before the court. The defendants have taken the benefit of the parol agreement, and must comply with their part thereof, and after refusal to convey the land to the plaintiff, the latter may maintain an action to recover the price or value of the unpaid consideration, and the form of the present action is sufficient for that purpose.

The defendants could convey and have refused, and are liable in damages (*Driggs v. Dwight*, 17 Wend. 71), and the party who has performed is entitled to recover of the party in default the amount or value of the particular consideration which has been withheld. *Thomas v. Dickinson*, 12 N. Y. 365; *Fossen v. Davison*, 2 Duer, 153. As to election of remedies and equitable lien, see *Bradley v. Bosley*, 1 Barb. Ch. 125.

In brief, here is a parol agreement for the exchange of lands, the plaintiff has wholly executed it and conveyed to the defendants, who, on their part, are in complete default, and refuse to convey.

If there be any doubt as to the sufficiency of the complaint, a motion for amendment can be made at special term, all the parties being apparently before the court.

The judgment should be reversed and new trial granted, costs to abide event.

*Judgment accordingly.*

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PETTIT v. TURNER, appellant.

*Contract for services — tender of performances.*

Plaintiff was employed by defendant for a specified time. After the term of his service had commenced he was prevented by defendant from entering upon his duties, and was finally discharged. *Held*, that plaintiff was not obliged to tender a performance of his services as a condition precedent to maintaining an action for their value.

APPEAL from a judgment in favor of plaintiff, entered upon the verdict of a jury.

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Pettit v. Turner.

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About the middle of October, 1867, the plaintiff, George Pettit, who was then in the employ of the firm of Shaffer & Hamilton, as a commercial traveler, under a contract, ending September 1, 1868, was engaged by defendant, Malcom C. Turner, to travel for him in the West Indies for five months, from November 1, 1867, to April 1, 1868. At the request of defendant plaintiff procured a release from Shaffer & Hamilton of his contract to travel for them, and went to his home in Niagara county, defendant agreeing to notify him by letter when he was required to begin his duties. Defendant postponed plaintiff's departure from time to time, until, in the month of December, he wrote plaintiff that he had concluded not to hire anybody on a salary. To this letter plaintiff made no reply. He remained idle until April 1, 1868, when he returned to the employ of Shaffer & Hamilton.

No agreement was made as to plaintiff's salary at the time he was engaged, but he was at that time receiving for similar services \$3,000 a year, which defendant knew. On the trial defendant moved to dismiss the complaint, on the ground that no tender of performance had been proved by plaintiff. The denial of this motion was the only question involved in the appeal.

*George W. Stephens*, for appellant.

*A. W. Brazee*, for respondent.

TAPPEN, J. The defendant agreed to employ the plaintiff on a trip to the West Indies, for the term of five months, commencing November 1, 1869; the plaintiff, at defendant's request, obtained a release of the plaintiff's unexpired engagement in the service of other parties, and at all times held himself in readiness to depart in defendant's service.

The plaintiff had a verdict, and on the appeal taken by defendant, the only question mooted is as to the ruling of the court below in refusing to dismiss the complaint, on the ground that no tender of performance on the part of the plaintiff had been proved.

A part of the agreement was that the defendant should have every thing ready for plaintiff's departure in two weeks, and in the mean time the plaintiff was to be allowed to return to his home in Niagara county, and defendant was to write plaintiff when ready to have him start. Two letters were put in evidence written by

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Bohringer v. Empire Mutual Life Insurance Co.

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defendant to plaintiff after the engagement was made, which show the employment of plaintiff, and plaintiff testifies that thereafter the defendant wrote him a letter in December, 1867, discharging him.

These letters and this discharge made it unnecessary for the plaintiff to tender performance. Where the defendant absolutely refuses to perform his agreement, the law does not impose upon the plaintiff the useless act of a tender of performance as a condition precedent to the maintenance of an action. *Grist v. Armour*, 35 Barb. 387; *Anderson v. Sherwood*, 56 id. 69. But after the nonsuit was denied, the testimony on the part of the defendant showed an offer and readiness by the plaintiff to perform the contract on his part, and this proof is available to the plaintiff upon the consideration of the whole case.

No other question is raised by the appellant. The judgment should be affirmed, with costs.

*Judgment affirmed.*

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BOHRINGER *et al.* v. EMPIRE MUTUAL LIFE INSURANCE COMPANY,  
appellant.

*Life insurance — application for policy not signed by applicant.*

The agent of a life insurance company received from J. a written application for a policy. Without the knowledge of J., the agent copied the application into the blanks of another company, of which he was also agent, and the second company issued a policy to J. upon such application. This company received from J. several premiums upon such policy. *Held*, in an action upon the policy by the representatives of J. after his death, that it was no defense that the application for the policy was not made or signed by J.

APPEAL from a judgment in favor of the plaintiff entered upon the report of a referee.

The action was brought upon a policy of life insurance issued by the defendant, the Empire Mutual Life Insurance Company of the city of New York, upon the life of Jacob Bohringer in favor of his wife and children, who are the plaintiffs herein. The opinion states the necessary facts.



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Bohringer v. Empire Mutual Life Insurance Co.

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*W. C. Whitney*, for appellant.

*A. Prentice*, for respondents.

TAPPEN, J. The defendant issued a policy on the life of Jacob Bohringer for \$5,000, payable at his death to his wife and children, and this action is brought to recover the amount.

The defense is, first, that Bohringer never signed the application, but that his signature was affixed by Michael Hack, a canvassing agent of the defendant; and second, fraudulent concealment and misrepresentations by Bohringer when he submitted to an examination on which the application and policy were based.

This agent testifies: "Bohringer made application to me for life insurance, the application was filled out in the blank form of the Empire State Life Insurance Company, and he was also examined by two doctors, and about that time I changed from the Empire State to the Empire Mutual Life Insurance Company, and all the business that I could possibly take from the Empire State to the Empire Mutual, I did so. I got policies for every application I handed in there; I copied the application, this application from the application of the Empire State Life Insurance Company; Dr. Sewell, (the medical examiner) copied his certificate from the other application, which was just the same, and gave the date he examined Mr. Bohringer. He signed that." This application, so made up, the witness presented to the defendant.

Bohringer was no party to this copying process. The defendant acted upon it, took the premium, issued the policy, and received several subsequent premiums. The same witness further testifies that he took forty-five of these changed applications to the defendants at one time, and was congratulated on his success in getting so many applications at one time.

It further appears that after Bohringer's death, the defendant's officers found that the application and signature were written by one and the same hand, a fact that was patent to them when they first received it.

The defendant contends that the policy was based on the application, that it was not Bohringer's application, for want of his proper signature, and hence that the policy is void. It was conceded that there was no substantial difference in the two applications, and under the circumstances the defendant cannot take advantage of the act of its accredited agent to avoid the policy.

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With respect to the other defense it is not made out by the testimony; on the contrary, the testimony as to Bohringer's condition, in respect to health and the diseases stated, justify the referee's conclusion in favor of the plaintiff. The judgment should be affirmed with costs.

*Judgment affirmed.*

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VAN SICKLE v. PALMER *et al.*, appellants.

*Usury — evidence.*

Defendant obtained a loan from plaintiff through G. & V., a firm of attorneys. At the time, defendant executed a bond and mortgage for \$5,666 and interest, and gave a certificate in writing that he had employed G. & V. to procure a loan of \$5,666 for him and had agreed to pay them for their services \$566. Defendant only received \$5,100. In an action to foreclose the mortgage, the defense was usury. *Held*, that the written certificate was not conclusive as to defendant, and he was entitled to show by G. whether the plaintiff shared in the amount paid to G. & V. for their services.

APPEAL from a judgment in favor of plaintiff entered upon the report of a referee.

The action was brought to foreclose a mortgage for \$5,666 and interest. The defendants, Spencer Palmer and his wife, who made the mortgage, defended the action upon the ground that a usurious rate of interest was agreed upon and paid at the time of obtaining the loan. Upon the trial, Spencer Palmer testified that Green & Van Sickle, attorneys at law, advertised that they had money to loan on bond and mortgage, and that he applied to them for a loan of \$5,100 and agreed to give his bond for \$5,666, payable in one year, and the mortgage in suit as security for the payment of the bond, that he received the \$5,100, and executed the bond and mortgage to plaintiff, who loaned the money; that plaintiff was present at the time of the execution of the mortgage, and at the receipt, by the witness, of a check for \$5,100, and that Greene & Van Sickle were acting as attorneys for plaintiff.

Plaintiff offered in evidence a certificate signed by Spencer Palmer, the defendant, and reading as follows:

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"GOSHEN, *March 30, 1871.*

"This is to certify that I have employed Messrs. Greene & Van Sickle, counselors at law, to procure for me a loan of \$5,666 on bond and mortgage on my property situate near Conklingtown, and have agreed to pay them for their services rendered in procuring said sum, \$566; and I further certify, that I have this day paid said Greene & Van Sickle the amount agreed upon between us for the purposes aforesaid.

"SPENCER PALMER."

The referee before whom the case was tried refused, upon objection from plaintiff's counsel, to allow George W. Greene, one of the firm of Greene & Van Sickle, who was produced as a witness by defendant, to answer these questions:

"Were you and your partner ever employed by Spencer Palmer as attorneys to procure a loan of \$5,600 on his farm near Conklingtown?"

"Did you communicate to D. Van Sickle (the plaintiff) the fact that Mr. Palmer was to pay ten per cent in addition to the amount of the mortgage?"

"Did you return any of that money (the money received from plaintiff for the loan) to the plaintiff?"

And other questions designed to show that plaintiff received part of the money said to be paid by defendant to the firm of Greene & Van Sickle.

It appeared in evidence that plaintiff paid Greene & Van Sickle, at the time of making the loan, by his check, \$5,666.

The referee found that the defense of usury was not established, and gave judgment in favor of plaintiff, from which this appeal was taken.

*Charles Matthews*, for appellants.

*Sharpe, Nanny & Van Sickle*, for respondent.

TAPPEN, J. Action to foreclose mortgage; defense, usury, in that the plaintiff retained ten per cent of the principal at the time of the loan as additional and usurious compensation.

On the trial before the referee, the defendants introduced one Greene as a witness. Greene and his partner were attorneys, who

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had to do with the transaction, and the question was whether they were the attorneys of the lender or borrower, it appearing that they had deducted the ten per cent at the time of the transaction, and it being insisted by the defendants that they had done this for the benefit of the plaintiff.

The referee excluded several questions put to the witness Greene, and the defendants duly excepted. From a perusal of the testimony the question of the plaintiff's interest in the ten per cent would seem to depend upon the veracity of Greene's statement, or that of other witnesses, received on the part of the plaintiff. And notwithstanding the written paper which the defendant signed, stating that he had employed Greene's law firm for the purpose of the loan, and agreed to pay them the ten per cent, it was still competent for the defendant to show by Greene what had been done with that money. If Greene was defendant's attorney, as the plaintiff claims, there was no privilege between plaintiff and Greene, and the written paper is not in its statement conclusive on the defendant. Van Sickle, who was Greene's partner, was fully examined on behalf of plaintiff, and the defendant was, therefore, entitled to Greene's version of the transaction.

For the error in rejecting the evidence of Greene, the judgment must be reversed and a new trial ordered at special term, costs to abide event.

*Judgment accordingly.*

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TAFT V. WRIGHT *et al.*

*Statute of limitations. Fraudulent conveyance. Assignment for benefit of creditors.*

Plaintiff, as assignee of a judgment against W., brought action in 1871, to set aside as fraudulent a conveyance of real estate made by W. in 1863. It appeared that plaintiff's assignor had notice of the conveyance, and its character, in 1862. *Held*, that the action was barred by the limitation contained in Code, § 91, subd. 6.

After the judgment in question was obtained W. made an assignment under the statute, for the benefit of his creditors. *Held*, that the judgment

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creditor was entitled notwithstanding such assignment to bring action to set aside the conveyance as fraudulent.

APPEAL, by both parties, from a judgment entered in favor of the plaintiff, Amariah A. Taft, for \$4,244.83, damages and costs, upon the report of a referee. The action was brought by the plaintiff, Amariah A. Taft against Caroline M. Wright individually and and as administratrix of the estate of John B. Wright, deceased, and two other defendants, David B. Babcock and Margaret Hill. The referee ordered judgment for the above amount against Wright and Babcock only, and dismissed the complaint as to Margaret Hill. The facts sufficiently appear in the opinion.

*Enos N. Taft and Addison Brown*, for plaintiff.

*Wm. W. Badger and J. M. Van Cott*, for defendant Caroline M. Wright.

*Lewis Hurst*, for defendant David B. Babcock.

*R. H. Chittenden*, for defendant Margaret Hill.

TAPPEN, J. The plaintiff, by assignment, in the year 1864, became the holder of a judgment recovered by one John H. Pearson against John B. Wright on the 7th of March, 1862, for \$5,201. The complaint is in the nature of a creditor's bill, and seeks to have adjudged as fraudulent and void a conveyance made by Wright to his wife, the defendant Caroline M. Wright, through one Frederick A. Coe, on December 26, 1861, of the house and lot 40 Pierrepont street, Brooklyn; also to have certain other property or securities which came to this defendant Caroline, on a sale of that property, decreed to be the property of the judgment debtor.

The Pierrepont street property so conveyed by the debtor, was subject to two mortgages to one Frederick A. Spies, on which a balance of \$8,000 was unpaid, and mortgage made on November, 1859, for the sum of \$12,000 by Wright to the defendant, Mrs. Hill, his mother-in-law, and by her, at or about the same time, assigned without consideration to her daughter, the defendant Caroline Wright.

Mrs. Wright sold the Pierrepont street property in April, 1863, and invested \$13,000 arising from the sale in the purchase of the

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premises No. 60 Montague street, and took conveyance thereof to herself, and in September, 1864, she sold the Montague street property for \$8,000 in cash and \$10,000 in bond and mortgage, which she held at the commencement of this action, and which plaintiff seeks to make subject to the payment of his judgment against Wright.

Mrs. Wright insists that her husband was her debtor, and that there was full value by reason of such indebtedness for all property which came to her by the conveyance and mortgage in question. It is insisted also by her, that the statute of limitations bars this action, and further, that by reason of a general assignment for the benefit of creditors, made by Wright in May, 1862, the right to bring an action of this nature is by the act of 1858 (Laws 1858, chap. 314), vested in the assignee, and that a judgment creditor cannot maintain it.

With respect to the Pierrepont street property, Mrs. Wright claims that the conveyance to her was in execution of a trust. It had been purchased, in the year 1858, from said Spies for \$18,000, of which \$6,000 was paid down, and two mortgages given to Spies, one for \$9,500, and one for \$2,500 for the balance of purchase-money. These mortgages were reduced by a payment of \$2,500, August 25, 1859, and \$3,500, May 2, 1860, and the defendant, Mrs. Hill, took an assignment of the \$2,500 mortgage to secure \$2,000 which she advanced in making these payments. And the principal question here is, who was the real party in interest in buying the Pierrepont street property, and whether the moneys used in making the purchase and in paying off the Spies mortgages, were the moneys of Wright or equitably of his wife.

If it can be substantiated, that Mrs. Wright's equitable claims against her husband were in amount equal to the sum she realized from the Pierrepont street property (\$13,000), it follows, that there was a valuable consideration for the conveyance to her, and such conveyance is valid and effectual if made by reason of such indebtedness.

The referee has found that the indebtedness of Wright to his wife was about \$10,490.59, which she was entitled to retain to her own use out of the \$13,000 net proceeds of the Pierrepont street property, leaving a balance in her hands of \$2,509.41, which he adjudged to have been received and held by her, as an equitable trustee, bound to account therefor to any pursuing creditor of her husband. Both the plaintiff and defendant excepted to the findings, and

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each brings an appeal, the plaintiff claiming that the credits to be allowed Mrs. Wright should not exceed \$4,000 or thereabouts.

Mrs. Wright, among the claims against her husband, presented one for \$1,500, being the amount of a legacy from her grandfather, which she avers came to her husband's hands in January, 1857; that certain profits arising thereon came to \$500 which was used by her husband by her request in making a payment on the Spies mortgage on August 25, 1859. These items were not allowed by the referee, but were rejected by him on the ground that the proof that Wright received this legacy was uncertain, and if he did receive it, that it was used by him for his wife in other ways.

Mrs. Hill, under examination at the trial of this case, as a witness called by plaintiff, testified, that Wright received the \$1,500 legacy and invested it in Ocean Bank stock about January, 1857, that it was afterward sold, and the proceeds used to pay the \$3,500 Spies mortgage before referred to.

From a perusal of the evidence, it seems to be sufficiently established, that the defendant Caroline should have credit for this legacy, and for what it produced in income, and with these sums allowed as owing to her from her husband, it will appear that the \$13,000 realized by her from the Pierrepont street property on its sale by her in April, 1863, did not entirely suffice to repay her the money and interest which her husband had received for her use.

From this conclusion, it follows that there was no balance in her hands as found by the referee, for which she could be called on to account to the creditors of the husband.

With respect to the statute of limitations, the Code, section 91, subdivision 6, provides a limitation of six years for the bringing of an action for relief on the ground of fraud, the cause of action not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

The plaintiff prosecutes as the assignee of John H. Pierson, the judgment creditor, who, previous to the assignment, took proceedings by a bill in equity against the judgment debtor for a discovery and to enforce payment of the judgment. These proceedings were pending from May, 1862, till October, 1862. The judgment debtor was examined therein on October, 16, 1862, and stated that he had conveyed the dwelling-house on Pierrepont street to Frederick A. Coe. Mr. Sidney Webster testifies, that he was Pierson's attorney in that proceeding, and that the fact or impression remaining in his

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memory is that Coe was in collusion with Wright to prevent Wright's creditors getting access to his property.

Of course when the plaintiff took the judgment from Pierson, he took it charged with the notice to or knowledge of Pierson touching the conveyance which is claimed to be fraudulent. The attorney of Pierson had this notice or knowledge as early as October, 1862, and his notice or knowledge obtained in a proceeding instituted for the benefit of Pierson, is sufficient to charge his client therewith. With respect to information to Pierson, the same witness says, "Judging from the usual course of my business, I must have informed him of what happened, but am unable to say when or how." There are other indications that the transactions of Wright with respect to the property were known to Pierson as a prosecuting creditor during the year 1862.

As this action was commenced in May, 1871, more than six years thereafter, the statute was well pleaded, and is a bar to the maintenance of the action. *Gates v. Andrews*, 37 N. Y. 657; 1 Hoff. Ch. 156; 15 N. Y. 505; 3 Sandf. 482; 41 N. Y. 164.

The remaining point that in case of an assignment for benefit of creditors, the assignee, being vested with the title, is the only person qualified to bring the action, is not well taken; Pierson was a judgment creditor of Wright before the assignment, and the assignee took subject thereto. *Stanwix Bank v. Leggett*, 51 N. Y. 552; *Chautauqua Bank v. Risley*, 19 N. Y. 375.

Exceptions were taken to the rulings of the referee in admitting or receiving evidence, but they have not been considered here in view of the conclusion reached on the main question.

Upon the whole case, and the testimony, it seems quite evident, that at the time Mrs. Wright took the Pierrepont street property, it was claimed by her, that her husband had invested in it the proceeds of her separate estate, and that he was, in fact, her debtor to a considerable sum, and that at the time of the conveyance to her the value of the property did not exceed the mortgage liens upon it and the amount of her equitable claims. It was purchased of Spies in 1858 for \$18,000, and its market value was but little, if any, greater in December, 1861, when conveyed to the defendant. When sold by Mr. Wright in the spring of 1863, it brought \$21,000, the appreciation of \$3,000 over the value of 1858 being simply the result of the impetus or inflation given to the values of all kinds of property by reason of the par of paper money.



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The judgment should be reversed and a new trial ordered at special term, costs to abide event, but as to the defendant Margaret Hill, the judgment dismissing the complaint should be affirmed with costs.

*Judgment accordingly.*

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PHILLIPS, appellant, v. CONKLIN.

*Contract to purchase real estate — false representations by vendee.*

Plaintiff, who owned two stores, represented to defendant, who desired to invest in real estate which would yield an immediate income, that one of the stores rented for \$900 a year and upwards, and that the other was already rented and the tenants ready to come in. Relying upon these statements, defendant agreed to purchase the stores. At the time a part of one of the stores was rented for \$600 a year, but no other part of either building was rented. In an action for damages resulting from defendant's refusal to complete the agreement to purchase, *held*, that the representations were material, and being untrue, defendant was not bound to carry out his contract.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The action was brought by Frank H. Phillips against Nathaniel Conklin, to recover \$1,000 stipulated damages for non-performance of an agreement to exchange lands. The essential facts appear in the opinion.

*R. H. Underhill*, for appellant.

*N. Millard*, for respondent.

TAPPEN, J. The plaintiff owned two houses and lots in Brooklyn, and the defendant owned a farm in Putnam county. The parties entered into an agreement for the exchange of their respective properties, and became bound to each other in the penal sum of \$1,000 as fixed and settled damages to be paid by the failing party. The defendant failing to perform, this action is brought to recover the damages. The chief defense passed upon by the referee was

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that the plaintiff and his agents made material representations as to the rental of the plaintiff's property, as an inducement to the defendant to enter into the contract, and that such representations were false.

The defendant was a farmer, of advanced age, and he desired to obtain property producing an immediate income for his support. The representations, proved to have been made to him when he examined plaintiff's property, were that one of the stores rented for and over \$900 per year, and that the other store was also rented, but not occupied, but the tenants were ready to come in. At the time of the making these representations a part of one of plaintiff's stores was rented at \$600 per year; but there were no tenants in any other part of the building, and no rent accruing therefrom.

The representations were a material inducement to the defendant's making the contract. They were not true, and they were made by plaintiff; and, in respect to the renting of one store at \$900 per year, the representations were also made in a letter from the broker, written to the defendant, and the broker had his information from the plaintiff.

The conclusions at which the referee arrived are supported by the testimony, and justified the defendant in refusing to be bound by the agreement. *Smith v. Countryman*, 30 N. Y. 655.

There is no positive standard by which to determine whether a fraud be material, but the following rule is laid down: "If the fraud be such that, had it not been practiced, the contract would not have been made or the transaction completed, then it is material." 2 Pars. on Contr. 267. And the representation being untrue and influential will vitiate the transaction, whether it be willfully and designedly false, or ignorantly or negligently untrue. *Taylor v. Fleet*, 1 Barb. 471; 1 Story's Eq. Jur., §§ 192, 195. All these elements appear in the case in favor of the defense, and the judgment should be affirmed, with costs.

*Judgment affirmed.*

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Brady v. Brundage.

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BRADY, appellant, v. BRUNDAGE, sheriff, etc.

*Sheriff. Arrest and bail in civil action. Escape — re-arrest and surrender.*

Defendant, a sheriff, under an order of arrest in an action by plaintiff against G., arrested G. and took from him an undertaking signed by two sureties, who failed to justify upon being excepted to by plaintiff. G. escaped, and after judgment and executions returned unsatisfied, plaintiff brought an action for the escape. During the pendency of this action, defendant re-arrested G. and surrendered him in the county jail. *Held*, that defendant was exonerated from his liability upon paying the costs of the action.

APPEAL from an order of the special term exonerating the defendant, Robert F. Brundage, sheriff of Westchester county, from liability for the escape of a party arrested by him in a civil action. The essential facts appear in the opinion.

BARNARD, P. J. The plaintiff commenced an action against one John J. McGurk, in which she procured an order of arrest. The defendant, under this order, arrested McGurk, and took from him an undertaking signed by two sureties, who failed to justify on their being excepted to by plaintiff. No new arrest was made and no new undertaking was given. It seems that the sheriff might easily have arrested the defendant after the failure to justify by the sureties. McGurk fled to Texas, and remained there in concealment until after judgment was obtained against him, and after an execution against his property was returned unsatisfied, and one against his person that he could not be found. This action was commenced against the sheriff in February, 1873, and was put at issue in May last. While this action was pending and in September, 1873, the sheriff re-arrested McGurk, and surrendered him in the county jail of Westchester county; and now makes this application to be exonerated from his liability. The court at special term exonerated him on his paying the costs of this action. The plaintiff appeals.

By the failure of the sureties to justify, the sheriff became himself "liable as bail." Code, § 201. He was entitled to the privileges of bail. *Buckman v. Comley*, 9 How. 180; *Sartos v. Merceques*, 9 id. 188. One of the privileges of bail is to exonerate himself within twenty days after suit, or within such further time as may be granted by the court, by surrendering the defendant in the order

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of arrest. Code, § 191. The object of the order of arrest was to procure the defendant personally to answer the execution in the action. This is accomplished. The plaintiff in this action is indemnified for his costs thus far. It would be a harsh rule, which would put on the sheriff an absolute liability to pay the judgment when the sureties fail to justify. The defendant is entitled to be bailed out day or night, and shall have reasonable opportunity to procure it before being committed to prison. Code, § 186. If the bail taken by the sheriff shall not justify, I see no reason why a larger liability should be imposed upon the sheriff than upon the bail if they had justified.

The order should be affirmed, with \$10 costs.

*Order affirmed.*

# THIRD DEPARTMENT.

GENERAL TERM, MARCH, 1874.

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BELL v. DAGG, appellant.

*Promissory notes — liability of seller of forged paper — Damages.*

Plaintiff bought of defendant a promissory note not due, purporting to be made by B, defendant declining to make himself responsible therefor. The note not being paid, plaintiff sued B, who set up that his signature was forged. Plaintiff asked defendant to prosecute the case, and gave him notice that he should hold him responsible for all costs if the note was proved to be forged. Defendant refused to prosecute, and, at the trial, the note was held to be forged.

*Held*, that these facts established a cause of action against defendant; that the judgment of B was conclusive evidence, as to defendant, of the forgery of the name of B, and the amount of costs plaintiff had to pay him, and that defendant was liable to plaintiff for the amount paid for the note, and the costs and expenses he was subjected to on account of the action against B.

*Held*, also, that in such an action, although no fraud is shown, the rule of damages is the same as it would be in an action upon an express warranty accompanied with fraudulent knowledge and representations.

APPEAL from a judgment for the plaintiff upon the report of a referee. The action was brought to recover the amount of money paid by the plaintiff, Calvin H. Bell, to the defendant, Walter Dagg, for a note purporting to have been made by one Joseph Brown for \$200, and alleged by him to be forged, together with the costs paid out by the plaintiff in prosecuting an action in the supreme court. Plaintiff sued Brown on said note, and on the trial plaintiff was beaten on account of the establishment of the forgery. The defendant in this suit had notice of all the proceedings in the action against Brown, and was requested to take charge of and prosecute that action.

This action was referred to B. R. Johnson, Esq., who reported in favor of plaintiff for the amount paid for the note, and interest, and

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also for the costs to which he was subjected in prosecuting the action against Brown. Other necessary facts appear in the opinion.

*W. Youmans* and *D. D. Niles*, for appellant, cited *Thomas v. Beebe*, 25 N. Y. 244; *Ross v. Mather*, 51 id. 110; *Wakeman v. Dalley*, id. 27; *Meyer v. Amidon*, 45 id. 169; *Oberlander v. Spiess*, id. 175; *Marsh v. Falker*, 40 id. 562; *Bayard v. Malcolm*, 2 Johns. 550; *Moore v. Noble*, 53 Barb. 425; *McGovern v. Payn*, 32 id. 83; *Marshall v. Gray*, 57 id. 414; *Curtis v. Brooks*, 37 id. 476; 1 *Wait's* Pr. 518, 519; *Van Santv. Pl. (Moak)* 470; 2 *Kent's Com.* (11th ed.) 647.

*C. H. Bell*, respondent in person, cited *Delaware Bank v. Jarvis*, 20 N. Y. 228; *Bennett v. Judson*, 21 id. 238; *Fowler v. Abrams*, 3 E. D. Smith, 1; *Craig v. Ward*, 36 Barb. 378; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Swartwout v. Payne*, 19 Johns. 296; *Blasdale v. Babcock*, 1 id. 517; *Kip v. Brigham*, 6 id. 158; *Kip v. Brigham*, 7 id. 168; *Barney v. Dewey*, 13 id. 225; *Ford v. Smith*, 1 Wend. 148; *Jackson v. Hill*, 5 id. 532; *Whitney v. National Bank of Potsdam*, 45 N. Y. 303; *Fake v. Smith*, 7 Abb. N. S. 106; *Foster v. Newbrough*, 8 Alb. L. J. 300.

BOARDMAN, J. The plaintiff bought of defendant a promissory note of one Brown, not due, for \$200, the defendant declining to make himself responsible for its payment. When it became due it was not paid, and plaintiff brought an action upon it against Brown. Brown, defending, alleged that the signature of his name to the note was a forgery. Plaintiff then gave notice of the action and of the defense to this defendant, and asked him to take charge of the case, and that he (plaintiff) should hold him (defendant) responsible for all costs accruing thereby, if such note was held to be forged. Defendant refused to take any part in that action, and upon the trial the note was held to be forged.

Plaintiff thereupon brought this action against the defendant, and on the trial before the referee recovered the amount paid by plaintiff for the note, the costs paid by plaintiff to Brown, and the costs incurred by plaintiff in the prosecution against Brown, with interest on the two sums first named, amounting in all to \$519.63. No objections were made to the pleadings, or to the sufficiency of the proof under the pleadings, except as hereafter stated, or to the

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admission or rejection of evidence that we are called upon to review. The only exceptions urged are directed toward the findings of fact and law by the referee. If, therefore, a cause of action was made out by the evidence, and if the referee has found the facts in accordance with such evidence, no ground for an exception will remain outside of his findings of law.

The cases are too recent and pointed to doubt that a cause of action was made out. Three cases in the court of appeals settle every point against the defendant. *Delaware Bank v. Jarvis*, 20 N. Y. 228; *Fake v. Smith*, 7 Abb. N. S. 106; *Whitney v. Nat. Bank of Potsdam*, 45 N. Y. 303.

By these cases it is held that the facts proved constitute a cause of action; that the judgment against Brown is conclusive evidence of the fact of the forgery, and of the amount of costs which plaintiff was bound to pay Brown, and that defendant, by reason of his privity or community of interest with plaintiff in that action, is estopped from denying in this action the forgery of said note, or his liability for the costs recovered thereby against plaintiff after plaintiff shall have paid them to Brown. Those cases are also authority for holding that the costs and expenses incurred on the part and behalf of the plaintiff in the action against Brown are also legitimate damages which the plaintiff is entitled to recover in this action. As no objection is made to any specific item of the damages recovered, I will assume none exists, and that the amount of the recovery is correct if the action is sustained.

The attempt of the defendant to reverse this judgment upon the ground that there is no evidence of fraud in the case must fail. The complaint seems to be of that mongrel kind known as for a fraudulent warranty. *Fowler v. Abrams*, 3 E. D. Smith, 1. While no fraud is shown by the evidence or the report of the referee, the law in all such cases raises an implied warranty of genuineness of signature. Under such implied warranty the rule of damages is as above laid down, and the same as would be recovered in an action on an express warranty accompanied with fraudulent knowledge and representations.

The defendant, on his motion for a nonsuit, seemed to have supposed that the element of fraud being struck out of the case, the plaintiff's action must fail. In this he was mistaken. Strike out every element of fraud in the case and the cause of action would remain as perfect as ever. Nor does the fact that defendant dis-

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claimed any further responsibility for the note, when he parted with it to plaintiff, save him. Such disclaimer did not cover the implied obligation or warranty that the note was genuine, but assuming that fact, it exempted the defendant from the liability for the payment of the note in case the maker was irresponsible.

Being satisfied that a good cause of action was made out, and that no valid defense thereto was established, the judgment appealed from should be affirmed, with costs.

*Judgment affirmed.*

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SPICER V. AYERS, appellant.

*Fraudulent conveyance. Demurrer. Implied trust. Equitable action.*

Plaintiffs, in their complaint, stated that A was, in his life-time, indebted to them, that he caused to be conveyed to defendant, his wife, real estate paid for by him, and conveyed to her, through a third person, other real estate owned by him, and afterward, at his own expense, improved said estate; that the conveyances were made and accepted with the intent to defraud A's creditors, and that A died insolvent, and defendant was appointed his administratrix, and had no personal property of deceased to pay plaintiffs' debt, and that deceased left no other real estate, and asked that the conveyances be set aside, and plaintiffs' debt be charged upon said real estate. *Held*, that the complaint contained sufficient facts to constitute a cause of action, and a demurrer, upon the ground that it did not, would not lie.

*Held*, also, that the conveyance to defendant of the lands paid for by A created a trust in favor of the creditors of A, and an equity action would lie (1 R. S. 747, §§ 51, 52) to enforce that trust.

*Held*, also, that defendant being both the administratrix of the deceased, and the party holding the fraudulent title, and the estate being insolvent, a creditor at large could maintain an action in equity for relief.

APPEAL from an order of the special term overruling demurrer to plaintiffs' complaint.

Plaintiffs, John E. Spicer and John D. Spicer, brought action as creditors at large of William H. Ayers, deceased, alleging an indebtedness, in his life-time, to them; that he caused certain real estate paid for by him to be conveyed to his wife, Mary Francis Ayers, the defendant; that he conveyed certain other real estate, through a third party, to his wife; that he improved such real estate at great cost, after such conveyances, at his own expense; that such conveyances were made and accepted for the purpose of hin-



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dering, delaying and defrauding the creditors of said W. H. Ayers; that he afterward died insolvent; that defendant was appointed his administratrix, but has no personal assets to pay plaintiffs' debt of \$1,900, or any part thereof, and that deceased left no other real estate than that described in the complaint. Relief was asked that such conveyances be set aside and that plaintiffs' debt be charged upon the said real estate, and paid therefrom.

The special term, upon demurrer to said complaint, as not stating a cause of action, overruled the same, and sustained the complaint.

*James Lansing*, for appellant, cited *McElwain v. Willis*, 9 Wend. 548; *Brinkerhoff v. Brown*, 4 Johns. Ch. 671; *Crippen v. Hudson*, 13 N. Y. 161; *Reubens v. Joel*, id. 488; *Dunlevy v. Tallmadge*, 32 id. 457; *Chautauqua Bank v. White*, 6 id. 252; *Ocean National Bank v. Olcott*, 46 id. 20; *Payne v. Sheldon*, 63 Barb. 170; *Bate v. Graham*, 11 N. Y. 237; *Thurber v. Blanck*, 50 id. 83; *Durant v. Supervisors of Albany*, 26 Wend. 106; *Willeys v. Vandenburg*, 34 Barb. 424; *Beck v. Burdett*, 1 Paige, 305.

*E. Cowen*, for respondent.

BOARDMAN, J. The complaint may be sustained upon two distinct grounds.

When a grant of land is made to one person and the consideration therefor is paid by another, no interest, legal or equitable, vests in the person paying the consideration, but a pure trust results to the creditors of the person paying therefor as against the grantee, which can only be enforced in equity. 1 R. S. 747 (*of uses and trusts*), §§ 51, 52.

As to a portion of lands described in the complaint this statute applies, and hence the plaintiff's only remedy was in equity to establish the trust. *Garfield v. Hatmaker*, 15 N. Y. 475; *Brewster v. Power*, 10 Paige, 562; *McCartney v. Bostwick*, 32 N. Y. 53.

In that view the demurrer was not well taken.

But it is claimed by the defendant that a creditor at large can never bring an action in equity to enforce or procure the payment of his debt. That is most true of a creditor's bill under the statutes, 2 R. S. 173. That remedy is given by statute through equity in aid of courts of law. It presupposes proceedings at law which would afford an adequate remedy but for some obstruction placed

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in the way. To remove such obstruction was the object of the remedy.

Besides these statutory creditors' suits, and before as well as since the passage of that statute, there has existed another class of creditors' suits not depending upon the statute, but upon principles inherent in equity jurisdiction, such as suits brought to administer assets, to reach property fraudulently transferred, to avoid circuity or multiplicity of actions, etc.

Under such authority, I apprehend, this complaint can be sustained as a whole. There are all of the elements in this case that give jurisdiction to equity, inability to get any relief at law, fraud, collusion between the debtor, now dead, and the defendant who holds title to the property fraudulently, and at the same time is the administratrix of the deceased. There are many English cases where the representative of the deceased debtor and the third party holding the fraudulent title to property are joined as defendants. It is held they may be so sued by a creditor at large when the estate is insolvent or there is collusion between the administrator and third person. *Gedge v. Traill*, 1 Russ. & Myl. 281; *Burrough v. Elton*, 11 Ves. 29. To the same effect is *Long v. Majestre*, 1 Johns. Ch. 306. The jurisdiction of equity in the class of cases spoken of is also recognized in *Chautauqua County Bank v. White*, 6 N. Y. 236, 252; *McCartney v. Bostwick*, 32 id. 53, 60, 62.

By reference to the above authorities and to the cases of *Lawton v. Levy*, 2 Edw. Ch. 199; *Hagan v. Walker*, 14 How. (U. S.) 29, and *Loomis v. Tift*, 16 Barb. 541, it is quite evident this action may be maintained, and that a cause of action is set forth in the complaint. As the demurrer is pointed to the cause of action only, it cannot be made available in case of a defect of parties plaintiff or defendant. The plaintiffs being creditors entitled to prosecute such an action, and the defendant being the fraudulent owner of the title sought to be reached, enough appears. Any defect of parties apparent upon the record might be met by a demurrer. As it has not been done in this case it need not be considered.

For the reasons stated the order of the special term overruling the demurrer should be affirmed with \$10 costs of appeal to the plaintiff, with leave to the defendant, within twenty days after notice of this decision, to serve an answer upon payment of costs of demurrer and of this appeal.

*Order affirmed.*

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Bush v. Westchester Fire Insurance Co.

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## BUSH v. WESTCHESTER FIRE INSURANCE COMPANY, appellant.

*Fire insurance—conditions in policy. Waiver. Local agent—authority of. Evidence.*

By the conditions of a fire insurance policy, the insured was, in case of loss, required to give immediate notice thereof to the company, and where the loss was that of personal property, to furnish an inventory of the goods lost, etc. Plaintiff's stock of goods which were insured were damaged by fire. He immediately notified the local agents of the company through whom had been issued the policy; they took possession of the damaged goods, and proofs of loss were made out and forwarded to the company in accordance with the directions of such agents. More than a month after receiving such proofs the company rejected them as insufficient, not being in compliance with the requirements of the policy. *Held*, that by neglecting to reject and return the proofs of loss within a reasonable time, the company waived any objections thereto or defects therein.

*Held*, also, that the local agents of the company, having an apparent authority to do so, could waive a strict compliance by plaintiff with the terms and conditions of the policy, although, by their power of attorney from the company, they were unauthorized to do so, plaintiff being ignorant of the restriction. And a demand of the company more than a month after receiving notice that plaintiff should comply with the strict requirements of the policy was a nullity.

Plaintiff who purchased and owned the goods destroyed, his clerk who was familiar with the goods and the business, and a person who made plaintiff's store his office and who had sold plaintiff some of the goods, were asked the amount and value of the goods in the store at the time of the fire. *Held*, that their testimony was admissible. *Teerpenning v. Corn Exchange Ins. Co.*, 43 N. Y. 279, distinguished.

APPEAL from a judgment entered upon the verdict of a jury.

The action is upon a policy of insurance issued by defendant to the plaintiff, Louis Bush, June 21, 1870, for \$2,500, upon a stock of merchandise in his possession at the city of Elmira. The policy was issued and countersigned by Sly & Straight, defendant's agents, at Elmira.

By the ninth condition of the policy, it was provided that the persons insured in case of a loss by fire "shall forthwith give notice of said loss to the company, and as soon after as possible render a particular account of such loss, signed and sworn to by them," that a certificate under the hand and seal of a magistrate or notary shall be furnished, and when personal property is damaged the insured shall forthwith cause it to be put in order, assorting and arranging

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'Bush v. Westchester Fire Insurance Co.

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the various articles according to their kind, separating the damaged from the undamaged, "and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality and cost of each article," and that the amount of sound value and damage shall then be ascertained by appraisal. By the sixth condition of the policy, it was provided that the conditions and restrictions of the policy could be waived only by a distinct specific agreement clearly expressed and indorsed on the policy.

A loss occurred on the 24th of November, 1870, and on the 30th of the same month proofs of loss were handed to Sly & Straight, who immediately forwarded them to the defendant.

By the evidence given at the trial, it appeared that the next morning after the fire plaintiff apprised Sly & Straight, and the agents of other companies in which he was insured, of his loss, and that the agents took possession of the store where the goods and the insured property saved were. An examination was made of the property and of plaintiff's books, lasting through several days, and the various agents came to the conclusion that the loss was total, and no further examination necessary, whereupon the proofs of loss were forwarded. These proofs were received by the company on the 1st of December.

The only statement of the loss ever rendered to the company was one containing amounts of invoices, December 1, 1869, stating purchases from that time to the time of the fire, which, in all, amounted to \$44,601.81, and deductions of goods disposed of \$21,713.41, leaving a balance of \$22,888.40, and these goods saved in a damaged condition, and of the value of \$3,000. This statement was handed to Sly & Straight, and by them sent to the company, and received December 1.

The defendant's adjuster came to Elmira in the early part of December, and had an interview with plaintiff, in which he told plaintiff that it was necessary for him to do certain acts in making known the amount of his loss to the company, and asking him to make an inventory of the goods saved, but did not require any inventory of the goods lost. As to whether plaintiff did this or not there was a conflict of evidence.

It was shown that in his action, up to the arrival of the adjuster, plaintiff acted in accordance with the directions of Sly & Straight,

On the 12th of January, 1871, the defendant informed plaintiff by letter, that his proofs of loss were not accepted.

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Defendant claimed that plaintiff did not comply with the conditions of the policy in (1) not giving notice of the loss at once to the company; (2) not furnishing an inventory of the goods destroyed.

It was claimed, on the part of plaintiff, that the acts of defendant's agent, at Elmira, constituted a waiver of the conditions of the policy, but defendant denied that the agents had authority to bind it by their acts in relation to the conditions in question. Other facts appear in the opinion.

The jury gave a verdict in favor of the plaintiff for the amount claimed.

*R. King*, for appellant.

*J. McGuire*, for respondent.

BOARDMAN, J. Nearly all the defendant's exceptions to the reception or rejection of evidence and to the charge of the judge are summed up in this proposition: That Sly & Straight, the defendant's agents in Elmira, could not waive the terms and conditions stated in defendant's policy, which was issued by Sly & Straight to plaintiff. If the defendant be successful in sustaining this proposition, under the facts proved, the plaintiff's recovery is wrong; otherwise the objections will not avail.

By the evidence it appears that the policy was not to be valid "unless countersigned by the duly authorized agent of defendant at Elmira, N. Y.;" that Sly & Straight were the agents, and only agents, of the defendant at Elmira; that the loss by fire occurred on the 24th of November, 1870; that proofs of loss were given by plaintiff on the 30th of November, to Sly & Straight, who immediately forwarded the same to defendant; that such proofs were received by the company on the 1st day of December; that such proofs of loss were and are still retained by the company; that no objection to their form or sufficiency was made by the company until the 12th day of January, 1871, when plaintiff was notified by letter from the company that they "are not accepted," without any reason assigned or defect suggested. By the verdict of the jury it is further found, and such finding is sustained by the evidence, that on the morning after the fire Sly & Straight, as defendant's local agents, with the agents of other companies having interest in the loss, took possession of the store and property saved, examined the same and the

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plaintiff's books, invoices, etc., agreed that the loss was total; that before the 12th of January, 1871, such of the property as was saved from the fire had been sold by the direction of Clark, the defendant's adjuster; that Clark reached Elmira on December 2, and had various interviews with plaintiff and Sly & Straight, and that plaintiff's loss was honest and for the amount insured. The evidence is conflicting as to whether Clark or any one for defendant demanded any inventory of the goods in the store before the 12th of January. According to plaintiff's evidence none was demanded. Defendant's witnesses swear to the contrary, and that they were refused access to plaintiff's books, etc. Plaintiff and his witnesses testify that such books, etc., were freely shown to defendant's agents until they were lost.

It is apparent from the whole evidence that Sly & Straight, from the time of the fire, assumed to act as defendant's agents in settling the loss and advising plaintiff, in the course which he pursued; that the plaintiff relied on them for information and protection, and that whatever he did was upon their assurance that it was right and proper for him to do. So the jury must have found under their instructions. Sly & Straight had a special power of attorney from the company defining their powers to act, but of this the plaintiff had no knowledge or information until about the time the action was commenced.

Upon the facts of the case, of which a skeleton only is herein given, it is quite evident that by neglecting to reject and return the proofs of loss with notice of their defects within a reasonable time, the defendant waived any objections thereto or deficiencies therein. *Savage v. Corn Ex. Ins. Co.*, 4 Bosw. 1; *O'Neil v. Buffalo Ins. Co.*, 3 N. Y. 122; *Bodle v. Chenango Ins. Co.*, 2 id. 53; *Owen v. Farmers' Ins. Co.*, 57 Barb. 518; *McLaughlin v. Washington Ins. Co.*, 23 Wend. 525.

It is also equally evident that Sly & Straight and plaintiff acted in the belief that Sly & Straight were properly engaged in the adjustment of the loss and in their instructions to plaintiff; that such conduct was within their employment by defendant, and in the line of their duty under their agency. The jury have found that they acted in good faith, and that plaintiff's loss was without fraud or dishonesty.

Under such circumstances, if an adjustment of the losses was made by the agents of other companies in connection with Sly &

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Straight, or with their assent and approval, and if they told plaintiff that such adjustment was all right, and that his loss would be paid, the plaintiff had a right to rely upon such promise, and the defendant should be estopped from denying such agents' acts. Sly & Straight were so far agents for the defendant in that locality (even if not in fact general agents there) as to bind the company in the exercise of an apparent authority with one who was ignorant of any restriction or qualification of their agency. As a consequence they could waive a strict compliance by plaintiff with the terms and conditions of the policy. The reasons for such a rule are presented by MILLER, J., in the case of *Insurance Co. v. Wilkinson*, 13 Wall. 222, and the rule is sanctioned by numerous decisions, among which may be cited *Rohrbach v. Aetna Ins. Co.*, 1 N. Y. Sup. 339, 341; *Lightbody v. North Amer. Ins. Co.*, 23 Wend. 22; *Post v. Aetna Ins. Co.*, 43 Barb. 351; *McEwen v. Montgomery Co. Ins. Co.*, 5 Hill, 101, 105; *Washington Ins. Co. v. Lawrence*, 53 Barb. 316.

Such a rule as to the agents of insurance companies is essential for the protection of the community from fraud and imposition. The jury having found with the plaintiff upon these points, their verdict is conclusive.

The demand made by defendant on January 12th for an inventory of the stock destroyed was a nullity, if the foregoing conclusions of law are justified. It is further submitted that so great a delay as six weeks after the fire before demand made was a degree of laches that should amount to a waiver of right, especially since the property saved had been sold to the knowledge of Clark, defendants' adjuster, and the books and papers had been lost.

Upon a careful examination of the other exceptions in the case, no error is discovered for which the judgment should be reversed.

There was certainly no evidence upon which the jury could have been justified in finding that plaintiff burned his own store. A verdict to that effect would have been set aside as against or without evidence to support it. The testimony may have been sufficient to excite suspicion, but does not rise to the dignity of proof.

*Terpenning v. Corn Exchange Ins. Co.*, 43 N. Y. 279, is cited by defendant to show that the court erred in allowing witnesses to be asked the amount of value of goods in the store at the time of the fire.

The case is readily distinguished from the one under consideration. In *Terpenning's* case the witness was a farmer having no

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knowledge of the quantity, quality or value of the stock, or experience in the business, or the course or results of the business in progress. In this case the plaintiff was the purchaser and owner of the stock, and possessed the most perfect knowledge of its value possible. Taylor was his clerk, auctioneer and salesman, familiar with the goods and the business, and Auhalt was the brother-in-law of plaintiff, making the store his office; had sold plaintiff a quantity of goods not long before; was familiar with the value of the goods in the store; was in the store the day before the fire and had assisted in marking a large amount of goods received just before the fire. These facts bring this case within the authority of *Clark v. Baird*, 9 N. Y. 183, 196. Judge JOHNSON, as the result of a careful examination of the authorities, lays down the rule (p. 196) "upon a question of value, the opinion of a witness, who has seen the thing in question, and is acquainted with the value of similar things, is not incompetent to be submitted to a jury." These goods were destroyed. No other persons were as competent as the three called to prove value. An inventory was impossible. The value proved was not the amount to be recovered. It was only to show that plaintiff had an insurable interest to the amount of his policies, which were less than \$10,000. The proof by plaintiff and others shows the value of the stock to be \$20,000 or over. If plaintiff's evidence in this respect was competent the other evidence, though incompetent, should not affect the result.

For the reasons assigned, the judgment should be affirmed, with costs.

*Judgment affirmed.*

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WHEELER V. ERIE RAILWAY COMPANY, appellant.

*Railroads — defective fences. Negligence.*

To render a railroad company liable under Laws 1850, chap. 140, and 1854, chap. 282, for killing animals escaping through a railroad fence, temporarily out of repair, actual or constructive notice of such want of repair must be brought to the company, and its neglect to repair within a reasonable time shown.

In an action against a railroad company for killing some sheep and a heifer, it was shown that the part of the fence through which the sheep escaped was



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known to the company to be out of repair before the escape, but there was no evidence that the fence was out of repair where the heifer escaped before such escape. *Held*, that the company was liable for the sheep but not for the heifer.

APPEAL from the judgment of a county court affirming the judgment of a justice's court in favor of the plaintiff for \$56 damages, for the loss of some sheep and a heifer which strayed through a railroad fence of defendants on to defendant's track and were killed by defendant's trains. The necessary facts appear in the opinion.

*O. W. Chapman*, for appellant.

*A. More*, for respondent.

BOARDMAN, J. A literal reading of the statute (Laws of 1850, ch. 140, and 1854, ch. 282), requiring railroad companies to build and maintain fences along the sides of their tracks would make the railroad companies absolutely liable for all stock escaping and killed upon their tracks when such fences are not in good repair, irrespective of the question of negligence on the part of the company, or wrong or negligence on the part of the owner. It has, however, been repeatedly decided that such literal construction ought not to be given, and the rule is now established that any temporary defect must be brought to the notice of the railroad company, and after such notice it must neglect to repair within a reasonable time, whereby cattle stray upon the road and are killed. This notice may be actual or positive, as when directly given to the proper agent of the railroad company, or it may be constructive, as when the defect is patent, easy to be seen, and has existed for so long a time before the damage done as to afford a reasonable presumption that the railroad company must have known of it through its agents, or else was guilty of independent negligence in not having, with proper diligence, examined the condition of its fences.

In this action, positive notice of defect was given defendant before the sheep were killed, and, by reason of its neglect to repair, the defendant was properly held to be liable to plaintiff for their value, six dollars.

The heifer escaped upon defendant's track at another place, and several weeks later. So far as appears from the evidence, no one knew that the fence, at the point where the heifer escaped, was

"not in good repair" before such escape. It is certain, therefore, that defendant had no prior actual notice of such defect, and could not be held liable upon that ground. Is there any evidence of constructive notice? Evidence of the condition of the fence at other places than where the heifer escaped is of no moment, except so far as a presumption may arise therefrom that all of the fence was in a like dilapidated condition. The recovery can only be had for the defect where the escape occurred. There is absolutely no evidence which shows the bad condition of this fence, or any portion of it, even upon the day or hour before the heifer escaped. That some portions of the fence may have been and were probably not in good repair is to be inferred; but when or how it became so does not appear. At the point of escape, the evidence is quite as consistent with the presumption that the fence was in good repair before the heifer went through it, thereby putting it out of repair, as that the hole was in the fence beforehand. In any event, there is no evidence how long such defects had existed, nor how patent they were. The owner of the premises never knew of the defect, neither did defendant's track supervisor or track-walkers, or any of the witnesses produced by plaintiff, until after the accident.

Under such circumstances, how can negligence be imputed to defendant? Upon what principle can the defendant be held liable? How has the defendant been notified of the defects in this fence, so as to constitute it an act of neglect to not repair? Can constructive notice to defendant be presumed, in defiance of all the evidence, which shows that no one, before the accident, knew of any defect?

To hold defendant liable in such case would result in holding defendants liable in all cases where the fact of the escape of cattle furnished the sole evidence of a prior defect, for which the defendant is sought to be made liable.

It follows that there is no evidence in this case that the fence was not in good repair before the heifer escaped, and consequently there was and could be no evidence of actual or constructive notice to defendant of such defect. Without such evidence, upon the authorities, the defendant was not guilty of negligence, and without negligence the defendant could not be made liable. The burden of proof is upon the plaintiff to establish negligence. *Murray v. N. Y. C. R. R. Co.*, 4 Keyes, 274; *Sherman v. West. Trans. Co.*, 62 Barb. 158; *Tracy v. Troy & Boston R. R. Co.*, 38 N. Y. 433; *Poler v. N. Y. C. R. R. Co.*, 16 id. 476.

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So far as damages were allowed to the plaintiff for the killing of the heifer, the judgment of the justice was erroneous ; but damages for sheep killed were properly recovered.

For such error the judgment of the county court and of the justice's court should both be reversed with costs to the appellant, unless the respondent shall, within twenty days after notice of this decision, stipulate to remit \$50 from said judgment, as of the date of the justice's judgment, in which case the judgment, as so modified, shall be affirmed, without costs to either party, in the county court or in this court

*Judgment accordingly.*

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MATTER OF WASHINGTON PARK V. BARNES *et al.*

*Eminent domain—commission to acquire title—right to discontinue.*

The board of commissioners of Washington park, in Albany, were authorized to acquire title to lands under the provisions of the general railroad law. In pursuance of their authority they took proceedings to condemn certain lands to the use of the park, and commissioners of appraisal were appointed who made awards of compensation to the land owners.

*Held*, that, until the awards were confirmed, the party seeking to acquire lands might discontinue further proceedings and abandon the attempt to acquire title, and that the board of commissioners of Washington park could alone ask for confirmation.

APPEAL from an order of the special term denying to the board of commissioners of Washington park leave to discontinue and abandon proceedings to condemn land for park uses after the damages had been assessed, but before the report of the commissioners for assessment of damages had been confirmed.

The board of commissioners of the Washington park, in the city of Albany, was organized in pursuance of chapter 582, Laws of 1869, and the acts amendatory thereto. By Laws 1872, chapter 45, such board was authorized to acquire title to lands to be taken for the purpose of a public park, in the city of Albany, under the provisions contained in §§ 14, 15, 16, 17, 18, 19, 20, 21 and 26 of what is known as the general railroad laws. (Laws 1850, chap. 140 ; 1851, chap. 19 ; 1854, chap. 282 ; 1864, chap. 582 ; 1869, chap. 237.)

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Pursuant to such authority, in May, 1873, the park commissioners made application for the appointment of commissioners of appraisal, who were thereupon appointed, and proceeded to appraise the compensation to be paid the owners of the lands proposed to be taken. After several hearings in the matter the awards to be made for the different parcels were announced, but before a report was made, and further proceedings had by the commissioners of appraisal, a motion was made at the special term, by the park commissioners, to discontinue and abandon the proceedings. This motion was opposed by William Barnes, Anne Hussey, Thomas B. Morrow and others, owners of the parcels of land appraised, and upon which awards had been made. At the special term the motion to discontinue was denied, from which decision and the order thereon the board of commissioners appealed.

*S. W. Rosendale and R. W. Peckham*, for appellants.

*Wm. Barnes, A. Bingham and T. D. Morrow*, for respondents.

Per CURIAM. The case of *Albany & Susq. R. R. Co. v. McClosky* seems directly in point, and would doubtless have controlled the decision of the court below in favor of the moving party, had the opinion of the lamented Judge PECKHAM (which has never been published) been there presented.\*

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\* NOTE.—The following is the case referred to, and which was decided at the Albany general term in December, 1869:

MATTER OF ALBANY & SUSQUEHANNA RAILROAD COMPANY v. McCLOSKEY, appellant.

This is an appeal by defendant from an order of special term, refusing to confirm the report of the commissioners of appraisal appointed to assess and appraise the compensation to the defendant for the taking of a piece of a lot of land for which the defendant had a lease for one year, with privilege of renewal for four more. The report awards, as compensation, the sum of \$850; it appears by the affidavits that, when applied to by the company's president, the defendant demanded \$500 for the premises wanted.

The company, deeming the award exorbitant, refused to pay it, hence the report. It was also stated in the report that, in addition to that sum, McClosky was to have the use of the sheds and fences, to be removed by him within eight days; but at the expiration of the lease the sheds were to be the property of the company, to be left on the ground. By this report, taken in connection with the affidavits, a strong case is made of an extraordinarily excessive assessment. The particulars it is not material to state. The company refused to accept or move to confirm the report, and on the argument of this motion formally notified the other side of its refusal to go further in the matter. Upon this ground the court, though it ordered the report to be filed, refused its confirmation, but gave leave to the applicant to move again for confirma-

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By that decision and opinion, it is established that no title vests until confirmation of the report of the commissioners for the assessment of damages; that until such confirmation the party seeking to acquire lands may discontinue further proceedings and abandon the attempt to acquire the title, and that the commissioners of Washington park, the petitioners, alone can ask for such confirmation.

The proceedings of the park commissioners are regulated by the same laws that govern railroad companies from the time that commissioners for appraisal of damages are appointed by the court. See, also, *Matter of Commissioners of Washington Park*, 52 N. Y. 137.

The English statutes regulating the exercise of the right of eminent domain are so different from ours that any decisions founded thereon would be unsafe precedents and authority in the construction of our statutes. 1 Redf. on Railw., ch. 15, § 1, (p. 384 of 4th ed.)

The park commissioners should have leave to discontinue and abandon any further proceedings for acquiring the title to the lands

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tion on payment of ten dollars costs. From that part of the order refusing confirmation of the report, the applicant appealed.

*O. M. Hungerford*, for appellant.

*H. Smith*, opposed.

PECKHAM, J. It cannot be pretended that this court has any power over these proceedings, except such as the statute confers. The statute authorizes the company, not the owner of the land, to move for the confirmation of the report. It does not authorize either party to make that motion, but confines it to the company. For what purpose that was confined to the company, it is not material to inquire. It is enough for this court that the language is plain to that effect. 3 Edm. Stat. at Large, 623, § 17.

Has this court authority to compel the company to move for the confirmation of the report, or to pay the damages reported? No such authority is conferred in terms, and, if it exists, it must be by implication from the language of the several provisions on this subject. The statute does provide "that in all cases of appraisal under this act and the act hereby amended, where the mode or manner of conducting all and any of the proceedings to the appraisal and the proceedings consequent thereon are not expressly provided for by the statute, the courts may make all the necessary orders "to carry into effect the object and intent of the act." Id. 642, § 5. But the difficulty in this case is that the statute has prescribed the mode and manner of confirming the report. To show that the legislature intentionally gave this authority to the company alone; in another case, where the title obtained by the company is defective, and the company wishes to perfect it, express authority is given to the party interested in such real estate to conduct the proceedings to a conclusion if the company delays or omits to prosecute the same. Id. 624, § 21. This provision, expressly confined to the particular case of proceedings taken to perfect a defective title, would seem to imply that it was not intended to be applicable to other cases. By the provisions of the statute no title exists in the company until the report is confirmed and the money awarded is actually paid or deposited in bank pursuant to the order of the court. Id. 623, § 18.

The courts have also substantially held that until confirmation of report there is no

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in question, upon paying to the landowners, parties to these proceedings, their necessary and reasonable costs and expenses paid or incurred attending the appraisalment of damages heretofore had, such costs and expenses to be ascertained by a referee, to be appointed by the court at special term.

The right to costs, etc., on the part of the landowners may be doubtful, but it is so eminently just and reasonable, and the park commissioners consenting thereto, the order will be so entered.

Order of special term reversed, and leave to discontinue as aforesaid granted, without costs of appeal.

*Order reversed.*

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change in the position of the parties as to title or compensation. The company has no vested interest in the land, or the landowner to the compensation. *B. & S. R. R. Co. v. Nesbitt*, 10 How. (U. S.) 395; *H. R. R. Co. v. Outwater*, 3 Sandf. 689.

The first case goes further, and holds that there is no vested interest, even after confirmation of the report. In the latter case, the court imposed as a condition of appointing commissioners for another assessment upon a changed route of the road, that the company should pay the costs and expenses of the landowner upon the first assessment. This, however, is the exercise of a very different power from that of making a positive order for the payment of the costs and expenses. The justice of allowing a railroad to experiment without any peril to itself, by an inquisition as to what damages it would be required to pay for a property, and then refusing to abide the award, unless entirely satisfactory, I confess is not apparent to me. This privilege, by this construction, belongs to one party (the railway) only. If satisfactory to the railway, it moves for confirmation, and the report is confirmed. The landowner has no remedy but to accept the compensation, unless the court afterward, on his motion, thinks that the report should be set aside for good cause shown. If we have the power to make an order absolutely, not as a condition that the railroad should pay the expenses of this commission, have we not just as much authority to order it to pay the damages found by the report?

There is as much legal ground for the one as the other. I do not think that the company can be heard for a moment to say or allege that this report was altogether too high, was a fraud, a gross wrong. The statute points out how and where that shall be inquired into. It is after the report is confirmed, and upon a direct motion to the court. I am strongly inclined to the opinion that this assessment or inquisition by these commissioners is irregular and would be set aside by reason of the conditions and qualifications it contains; yet the company cannot probably raise any such question in this stage of the case.

Plain justice requires that the company should proceed, or at least that it should pay the expenses, etc., of the landowner, so far as it has gone; but I think the statute has given no power to this court to make such an order. The legislature can afford the remedy.

*Order affirmed.*

## SANFORD V. SANFORD, appellant.

*Survivorship. Construction of will. Evidence. Estoppel.*

J. S. loaned defendant \$5,000, taking therefor a note of defendant payable to J. S. and plaintiff, his wife, jointly. Afterward J. S. was declared insane, and a committee of his estate was appointed to whom plaintiff delivered the note. Subsequently J. S. died, leaving a will in which was a specific bequest to plaintiff which was declared to be in lieu of dower and every claim against the testator's estate. Afterward the note was given up to plaintiff, who was executrix under the will, and she gave a receipt in which the note was described as belonging to the estate. There was evidence that the testator did not intend to give the note in addition to the bequest. *Held*, that upon the face of the note plaintiff was the owner of it, and this conclusion could be overcome only by evidence of a transfer to J. S., and such transfer did not appear. *Held*, also, that evidence of the intent of J. S. as to the disposition of his property could not change the will, there being no latent or patent ambiguity therein.

*Held*, also, that the acts of the plaintiff, in relation to the note, did not estop her from claiming title.

Evidence was given in explanation of her acts, showing that plaintiff was ignorant of her rights. *Held*, admissible.

APPEAL by defendant from a judgment in favor of the plaintiff for \$6,879.27, rendered upon a decision of the court upon a trial without a jury.

The action was upon a promissory note dated June 20, 1864, for \$5,000 and interest, payable in two years, signed by William A. Sanford, the defendant, and payable to the joint order of his father, Joseph H. Sanford and Maria D. Sanford, the plaintiff, who was the wife of said Joseph.

The defense was that the plaintiff was not the real party in interest, but that the note belonged to the estate of said Joseph H. Sanford, deceased.

The consideration of the note was a loan of money made by Joseph H. Sanford to the defendant. Some interest and principal had been paid on the note. On the 19th day of July, 1865, said Joseph made and duly executed his last will and testament, wherein he devised and bequeathed the bulk of his real and personal property to the plaintiff, including a bequest of \$10,000 in cash, which devise and bequest were expressed in said will to be in lieu of dower and every and all claims upon the estate.

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On the 5th of June, 1866, a committee was appointed to take charge of the estate of said Joseph, he having become a lunatic, and the note was delivered by plaintiff to such committee as part of her husband's property. The committee retained the note until after the death of said Joseph, and until after plaintiff qualified as one of the executors under the will. At the time of taking possession of the note plaintiff gave a receipt in which the note in question was described as belonging to the estate of the deceased.

Some evidence was given showing that the husband did not intend, by his will, to give the plaintiff a greater sum than \$10,000, and did not intend to have the note pass to her in addition to such amount.

The case was first tried in 1868, before Mr. Justice JAMES as referee. He excluded the defense, and held that the form of the note was conclusive evidence as to plaintiff's right to recover as survivor, and that she being the apparent holder, it was immaterial as to whether, as between her and the estate, she was the actual holder or not. The general term affirmed this decision and the court of appeals reversed it, and a new trial was had and judgment rendered for plaintiff. Upon appeal to the general term a new trial was ordered, which was had before Mr. Justice JOSEPH POTTER, and from the judgment thereat this appeal is taken.

Many other facts are stated in the report of the case, when in the court of appeals, in 45 N. Y. 723. Additional facts were proved upon the present trial, which will sufficiently appear in the opinion.

*Edward C. James*, for respondent.

*L. W. Russell*, for appellant.

BOARDMAN, J. A critical reading of the case and the appellant's points satisfies this court that there is no error for which this judgment should be reversed and a new trial granted.

1. The law, upon the face of the paper alone, would make plaintiff the owner of the note. That legal conclusion could be overcome by evidence of an actual transfer of her inchoate interest to her husband in his life-time, or of such facts, circumstances or declarations upon her part, after the death of her husband, as should satisfy a court or jury that such transfer had been made to her husband while living. 45 N. Y. 723.



The defendant attempted, by both means, upon the trial, to satisfy the court of such transfer and failed. There is no satisfactory evidence of an actual transfer during the husband's life-time to him. It is fair to assume that both the husband and wife supposed the note in suit at his decease would be assets belonging to his estate. Doubtless the testator, upon making provision for his wife by will, intended she should not take this note by survivorship. Very likely neither of them knew the legal rule which would control the transmission of its title upon his death. But there is nothing in the will that carries such intent and purpose into legal effect. It is simply a failure by will to express the real purpose of the testator. As there is no ambiguity, latent or patent, in the terms of the will, it must be construed literally and according to its terms. The intent of the testator, even if clearly proved, cannot change the will or operate upon its construction. Still less can such intent overrule the law in its application to property not mentioned in the will. The evidence of plaintiff's acts and declarations, inconsistent with her claim of title after her husband's death, are not of such a conclusive character as necessarily to overthrow the legal presumption of title in plaintiff. Beside this we have the plaintiff's explanation of such evidence in her ignorance of her rights and her claim that her title was consistent with her deceased husband's intent, founded upon proof of his declaration of a gift of the note to her in his life-time. This evidence was admissible for what it was worth, but it still leaves to be determined as a fact whether the note belonged to the plaintiff or the estate. That fact having been determined in favor of the plaintiff is conclusive, unless plainly against the weight of evidence, of which there can be no pretense.

This note, upon such finding, did not become a part of the estate. Plaintiff's claim of ownership was not, therefore, a claim on the estate, so as to be cut off under the first provision in the will, giving to plaintiff a legacy of \$10,000, "in lieu of dower, and every and all claims on my estate." The court of appeals settled that proposition when the case was before it.

Nor is there any pretense of an estoppel arising from plaintiff's acts and declarations after her husband's death. No one has parted with any money or property upon the faith of her acts nor has any one been thereby injured. It lacks all the elements of an estoppel. No one was misled; no one intended to mislead; no one was harmed

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or injured by the conduct or admission of the plaintiff. *Jewett v. Miller*, 10 N. Y. 402; *Griffith v. Beecher*, 10 Barb. 432.

The objection to plaintiff's evidence of ignorance of her rights is not well taken. So held in this case of *Sanford v. Sanford*, 61 Barb. 304, in relation to the same matter.

The objection to plaintiff's evidence that the note came into her possession in 1865 is not tenable. No ground of objection was stated. *Levin v. Russell*, 42 N. Y. 251. The evidence is not necessarily of a transaction with her deceased husband, as might have appeared if a proper ground of objection had been made. A still better reason is that, in the view of the whole case here taken, it was entirely immaterial when the note in suit came into plaintiff's possession.

This summary review of appellant's points reveals nothing of error which should induce this court to interfere with the decision had.

The judgment is therefore affirmed, with costs.

*Judgment affirmed.*

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REYNOLDS, administrator, etc., v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, appellant.

*Negligence—degree of care required of a child.*

A boy about twelve years old was killed at a highway crossing by defendant's railroad train: *Held*, that the boy was bound to exercise only such care as a person of his age, of ordinary prudence, would exercise, and under such rule it was for the jury to say whether the deceased was guilty of contributory negligence.

Contributory negligence must be proved.

APPEAL from a judgment in favor of the plaintiff, upon the verdict of a jury, and from an order denying a new trial.

The action was brought to recover damages for the death of Austin Reynolds, a boy twelve years and three months old, who was run over and killed by a train of cars on defendant's road, at what is known as Cram's crossing, a highway crossing about two miles east of the city of Schenectady.

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The accident happened December 13, 1872. At that time deceased was attending school near the crossing, and had to cross the railroad in going and coming between the school-house and his home, and usually passed over the track four times a day. After leaving school upon the day in question, he and a companion went together toward the crossing. Shortly before reaching it, his companion left him. He was not afterward seen alive, but a few minutes after his companion found his dead body near the track, where he had been killed by a passing train.

The evidence showed that as the deceased was approaching the crossing there were two trains passing in different directions, one a passenger train, the other a long freight train with two engines. There was a conflict of testimony as to whether or not the engine bells were rung.

The boy was found in the cattle trap, between the tracks. Under what circumstances he was struck or by what train, was only a matter of conjecture. It was shown that when within ten feet of the highway, upon the bed of the same, a boy of the size of deceased could see an engine 750 feet distant. If approaching on a foot-path which ran on the side of the highway, he would have to come much nearer the track before he could see the coming engine.

The jury found in favor of the plaintiff, Jacob Reynolds, who brings this action as administrator of his deceased son for \$800.

*S. W. Jackson*, for appellant.

*Isaac Lawson*, for respondent.

BOARDMAN, J. No exceptions are taken to the charge of the judge or to the admission or rejection of evidence.

The only reasons urged for granting a new trial are :

1st. That plaintiff should have been nonsuited because no negligence was shown on the part of the defendant.

2d. That upon the evidence plaintiff's intestate was guilty of contributory negligence whereby the injury occurred.

Upon the first proposition there was conflicting evidence in relation to the ringing of the bells by defendant's servants that could only be decided by the jury.

Upon the second proposition no positive evidence is given upon either side. Contributory negligence must be proved. Had the

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deceased been of full age and possessed of ordinary faculties and intelligence, he would probably have been held guilty of contributory negligence, which would have prevented a recovery under the authority of *Wilcox v. Rome, etc., R. R. Co.*, 39 N. Y. 366; *Gonzales v. N. Y. & H. R. R. Co.*, 38 id. 442; *Beisiegel v. N. Y. C. R. R. Co.*, 40 id. 22; *Grippen v. N. Y. C. R. R. Co.*, id. 51; *Haight v. N. Y. C. R. R. Co.*, 7 Lans. 11, because for ten feet before the deceased reached the track upon which he was struck he had an unobstructed view of that track for 750 feet or over in the direction from which the train came.

Does the fact that the deceased was a boy of only 12 years of age change the rule?

It is contended by the plaintiff that deceased was to exercise care only in proportion to his age and mental and physical ability, that the same care and discretion is not exacted of a boy 12 years of age as in case of a man of mature years. That in this case the rule is and should be that he shall exercise such care as a person of his age, of ordinary prudence, would exercise under like circumstances. In support of this proposition, the following cases are cited: '*Costello v. S. B. & N. Y. R. R. Co.*, 8 Alb. Law Jour: 45; *Mowry v. Central City R. R. Co.*, id. 125; *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455; *O'Mara v. H. R. R. R. Co.*, id. 445.

In hostility to such a doctrine, we are cited to the case of *Honegsberger v. Second Av. R. R. Co.*, 1 Keyes, 570. The weight of authority would seem to be upon the side of the plaintiff.

The question of negligence under such a rule depends upon so many circumstances, and is of such a complex character, that it would be difficult, if not impossible, in a case like this, to say, as matter of law, what constitutes it. For this reason, if the fact of the negligence of deceased is doubtful and uncertain, the submission of the question in a proper manner to the decision of a jury ought not to be held to be error. *Dickens v. N. Y. C. R. R. Co.*, 1 Keyes, 23, 28; *O'Mara v. H. R. R. R. Co.*, *ante*.

By an examination of the charge it will be seen that such disposition was made of the question by the learned judge in a very prudent and careful manner.

The order denying motion for a new trial upon the minutes should be affirmed, and the motion for a new trial upon the case and exceptions should be denied, with costs to the plaintiff.

*Ordered accordingly.*

## MOE v. MOE, appellant.

*Divorce. Conflict of law. Judgment obtained in another state against a non-resident.*

Plaintiff and T., her husband, lived in Massachusetts. She left him and went to Vermont, where she obtained a divorce upon the ground of his abandonment of her. In that action, personal service of some of the papers was admitted by T., who waived all objections to the service, and the judgment was obtained by default. Plaintiff then married defendant in this State. In an action against defendant for divorce, defendant set up that plaintiff was still the wife of T. *Held* (following *Holmes v. Holmes*, 4 Lans. 388), that the cause of action against T. not having arisen in Vermont, or while the parties resided there, and the service on T. not being in that State, its courts had no jurisdiction to annul the marriage between plaintiff and T., and the decree to that effect was therefore a nullity.

APPEAL from a judgment in favor of plaintiff, entered on the report of a referee.

The action is for divorce *a vinculo*, for adultery alleged to have been committed in May, 1868.

Plaintiff was married to one Thurston, who is still living, at Lowell, Massachusetts, in 1850. They resided for several years thereafter in Massachusetts, then removed to Vermont, where they lived for a year or two; then, in May, 1854, returned to Fitchburg, Massachusetts, where they continued to live together until April, 1856, when the plaintiff left Thurston and went back to Vermont. Thurston has since continued to reside in Massachusetts. In 1859 plaintiff, in the courts of Vermont, obtained a divorce from Thurston upon the ground of his abandonment of her. The papers, or some of them, were personally served upon Thurston, at Fitchburg, Massachusetts, and he in writing accepted legal service thereof, and waived all objections to the service. In November, 1862, plaintiff married the defendant in this State. At the commencement of this action, and since, the defendant was and has been living with a woman, other than plaintiff, as her husband.

Plaintiff now brings action for that cause. Defendant answers, setting up plaintiff's former marriage with Thurston, and that he is still living, thus nullifying the pretended marriage between the parties in this action.

Upon the trial plaintiff offered in evidence the Vermont decree of divorce, which was received under objection, and upon the faith thereof the referee decided that the marriage between these parties in 1862 was valid, and that the plaintiff is entitled to a decree for a divorce from the defendant and judgment is so entered.

*Edward C. James*, for appellant.

*G. S. Adams*, for respondent.

BOARDMAN, J. In the case of *Holmes v. Holmes*, 4 Lans. 388 (as to facts more fully reported in 57 Barb. 305), the parties were married in this State, and for some time continued to reside here. The plaintiff then left his wife in this State and went to Iowa. While there he brought an action for divorce against his wife on account of cruel and inhuman treatment and desertion by the defendant toward the plaintiff. Due notice of the proceedings, in accordance with the laws of Iowa, were personally served on defendant in this State, who did not appear, but suffered a default, and upon the pleadings and proofs of plaintiff a decree of absolute divorce was entered in favor of the plaintiff against the defendant.

The defendant, after such decree, married again in this State, whereupon the plaintiff returned to this State and brought his action of divorce for adultery against defendant. She set up by answer the decree obtained by her husband in Iowa, as above stated, and alleged the necessary jurisdictional facts, except service being out of the State, upon a non-resident defendant, and further alleged that said decree, by the laws of Iowa then and there and at all times since, was legal, valid and effectual, that thereby the marriage contract had been annulled, and the defendant was restored thereby to the rights of an unmarried woman, including the right to marry again.

The plaintiff demurred to the answer that it did not state facts sufficient to constitute a defense, thereby admitting all the facts set up in the answer.

The general term of this department in December, 1871, held such demurrer well taken, and that the decree was not valid here for any purpose, and, as a consequence, that the husband, who had obtained the decree in Iowa, was not bound by it nor estopped from maintaining the action in this State against the wife who had remarried upon the faith of such decree.

Upon a careful reading of the opinion of Mr. Justice PARKER, I am unable to see why his reasoning does not apply in all respects to this case with much greater force.

The cause of action in both cases arose out of the State attempting to exercise jurisdiction, while the parties to such actions were residing out of such State. In each the plaintiff leaves the defendant and goes to another State and procures a divorce under the laws of such State upon personal service upon the defendant of notice of proceedings, out of the State. In *Holmes v. Holmes*, the alleged offense for which the divorce was granted was not a cause for absolute divorce in this State, where the parties at the time of such offense resided. In the case at bar, it does not appear whether desertion was a cause for absolute divorce in or prior to 1859 in the State of Massachusetts. In the former case, the service outside of the State of notice stood conceded in its broadest sense; in the latter, while service of a notice is admitted, the sufficiency of such notice under the laws of Vermont is denied. Both were cases of judgment by default, no appearance being had by either defendant. There is as much cause for doubting the *bona fides* of the residence of the plaintiff in one case as the other.

"On no principle," says Judge PARKER, "can the courts of Iowa be said to have jurisdiction of the subject-matter. Jurisdiction of the subject-matter must, of course, exist at the time of the commission of the offense or not at all. The law of the place of domicile at the time of the commission of the offense \* \* will control. Every State has the right to dissolve the marriage relation of all its domiciled inhabitants *for causes occurring while such domicile continues*." The learned judge, therefore, concludes that "the courts of Iowa \* \* \* acquired no jurisdiction of the subject-matter of the action."

Upon the insufficiency of the service of notice, the opinion is equally clear and conclusive. To give jurisdiction of the party (p. 392), "service of process can only be made within the territorial jurisdiction of the court \* \* the process of the court cannot run into the territory of another government." The service in that case "gave no jurisdiction of the person of the defendant, for as appears, both upon principle and authority, such service out of the State is a nullity." *Todd v. Kerr*, 42 Barb. 317.

The case of *Holmes v. Holmes* is therefore conclusive, and the referee erred in giving force and effect to the decree of the Vermont

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court as evidence of the dissolution of the marriage contract between plaintiff and Thurston, and of the right of the plaintiff to marry again. See, also, *Kerr v. Kerr*, 41 N. Y. 272; *McGiffert v. McGiffert*, 31 Barb. 69; *Vischer v. Vischer*, 12 id. 640; *Borden v. Fitch*, 15 Johns. 141; *Dunn v. Dunn*, 4 Paige, 425; 2 Bish. on Mar. & Div., § 156 (781) 4th ed., *et seq.*

Besides the considerations above noted, it is quite probable, from the evidence in this case, that the Vermont decree was void for fraud in that the alleged desertion of plaintiff by Thurston was not true, in fact, and if true, did not occur in the State of Vermont, so as to give jurisdiction of the subject-matter. *Vischer v. Vischer*, *ante*.

However that may be, the judgment must be reversed and a new trial granted.

*Judgment accordingly.*

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SMITH, appellant, v. KEYES.

*Innkeeper — lien upon property of master for entertainment of servant. Claim and delivery — amount of judgment in action for. Practice — correcting judgment on appeal.*

C., an employee of plaintiff, applied for entertainment at defendant's inn, and was furnished a room. He was afterward informed that the regular price for a guest was \$8 per week, which he should be charged. Subsequently he brought to the inn a horse and wagon, belonging to plaintiff, which he used in plaintiff's business. C. left the inn owing a balance for his entertainment, and defendant retained plaintiff's horse, etc., as security for such balance. In an action by plaintiff to recover possession of such horse, etc., *held*, that the relation of innkeeper and guest existed between defendant and C., and that, even though C. was a boarder, defendant had a lien on the horse, etc., for the amount due from him.

The referee before whom the case was tried gave defendant judgment for the return of the property, or its value in case a return could not be had. *Held*, that defendant was entitled to judgment, not for the whole value of the property, but only for the amount due from C. *Held*, also, that the court, on appeal, might correct the judgment so as to conform to the proofs, by reducing it to the amount of defendant's claim.

APPEAL from a judgment in favor of defendant, entered upon the report of a referee. The action was brought to recover the possession of a horse, wagon and harness, valued at \$350.

The facts found by the referee, and appearing in the evidence, were as follows:

During the year 1872 the defendant, Daniel L. Keyes, was an



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innkeeper in the village of Cooperstown, N. Y. On the 6th of February in that year, one Charles Cady, an employee of the plaintiff, Oscar Smith, and who was engaged in selling sewing machines for said Smith, applied for entertainment at defendant's inn. He was assigned a room and took up his quarters there, taking the key of the room. The regular price charged to guests who occupied that room was six dollars per week, of which Cady was informed. On the 21st of April Cady brought the horse and wagon in question to the inn, and it was received by defendant, who informed Cady that the charge for keeping and taking care of the same would be \$5 per week. Cady remained at the inn until May 28, when he left. During the time while he remained a guest of the inn, he was absent two weeks, keeping the key of his room, and leaving his baggage therein. During this absence defendant charged Cady \$3 per week, or half-price for such room, which was the custom of the hotel (of which Cady was informed) when guests were absent and retained possession of their rooms. The total amount of charges, as testified to by plaintiff's clerk, against Cady during the time of his stay was \$117.98, upon which he had paid \$24, leaving a balance due of \$93.98. The horse, wagon and harness were the property of the plaintiff, and the wagon box had upon it this lettering, "Wheeler & Wilson sewing machines, O. Smith, agent," which was noticed by defendant's clerk when the team was received at the inn. The team was used by Cady while he remained at the inn in his business of selling sewing machines.

Defendant, after Cady left, retained the property, claiming to hold it as security for the balance due from Cady, and plaintiff demanded said property, and, upon refusal to deliver, brought this action in which the property was taken. Plaintiff alleged in his complaint that the value of the property was \$350. The case was referred, and upon the trial the referee reported that the defendant was entitled to a return of the property, or the value thereof, in case a return could not be had. Judgment was accordingly entered in favor of defendant for \$350 and costs, from which plaintiff appealed.

*E. D. Stronk*, for appellant.

*Samuel A. Bowen*, for respondent.

BOARDMAN, J. The evidence tends quite strongly to show the relations between defendant and Cady to be that of innkeeper and guest. In that case, and even if the evidence were conflicting and

doubtful, the finding of the referee would be justified and the defense sustained. If, however, their relation was that of boarding-house keeper and boarder, the result, for two reasons, would not be changed or the judgment reversed.

The essential fact is the lien. Whether it be of the one kind or another is quite immaterial, and the variance should be disregarded. *Cady v. Allen*, 22 Barb. 388.

Perhaps it is a better reason that the plaintiff, upon the trial, did not object to the form or sufficiency of the answer, to the materiality or pertinency of the evidence under the pleadings, to the right to recover under the pleadings and proofs, or to the sufficiency of the evidence to sustain the defense. Indeed, there is not an exception in the case, except to the findings, and refusals to find, of the referee. Under such circumstances the referee was at liberty to give to the defendant such relief as the whole case should entitle him to. Had an objection been taken in the court below, an amendment, if necessary to confirm the pleadings to the proof, would have been granted of course.

This court, on appeal, may now do the same. *Cady v. Allen*, 22 Barb. 388; *Bate v. Graham*, 11 N. Y. 237; 7 Robert, 17; Code, § 173.

The rights of the defendant are bold and apparent. It would not be creditable to our laws if such rights were lost through a technicality in no wise affecting the merits. It is the first duty of courts to protect and enforce rights. The forms and modes of procedure are only auxiliary thereto. They are the remedies, and should be made subservient to rights whenever it may be done without danger to the rights of others. For these reasons no valid objection is seen why such judgment may not be given by this court as the conceded facts in the case demand.

The court below, however, erred in holding that defendant, upon the facts proved, was entitled to recover the full value of the property in case a return was not had. The defendant was not the general owner, but had only a special property which was limited by the amount of his lien. For this amount only was he entitled to recover in money. *Rhoads v. Woods*, 41 Barb. 471; *Seaman v. Luce*, 23 id. 240; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Dows v. Greene*, 24 id. 638. That amount on the 28th day of May, 1872, was \$93.98. The horse was kept by defendant from May 28, 1872, to June 18, 1872, three weeks, at \$5 per week, making in all, June 19, 1872, when this action was commenced, and plaintiff took the property,

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\$108.98. Interest on that amount, by way of damages to defendant, should be allowed from June 19, 1872, to the date of judgment, February 10, 1873, which is \$5.02, making the total value of defendant's special interest in the property at the last date \$114. Judgment should therefore be reversed and a new trial granted, costs to abide the event, unless the defendant shall stipulate to reduce the amount to be recovered in case a return of the property is not had from \$350 to \$114, and to amend the judgment accordingly, and if such stipulation be made and served within thirty days after notice of this decision, this judgment, as so amended, shall be affirmed without costs to either party of this appeal.

*Judgment accordingly.*

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JACKSON *et al.*, executors, etc., v. NEW YORK CENTRAL RAILROAD COMPANY, appellant.

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*Corporations. Railroad companies—when directors entitled to compensation. Evidence of experts. Interest.*

A director of a railroad company is not entitled to compensation for his legitimate and ordinary duties as director, but is, for his personal services, beyond the ordinary range of his official duties upon an actual employment by the company.

Plaintiff's testator, while a director of a railroad company, acted as legal counsel in a certain action, to which the company was a party. *Held*, that the testator was entitled to compensation when so employed by the company, and that it was not indispensable that his employment should be by a formal resolution of the board of directors, but it might be inferred from the nature of the employment, the importance of the subject-matter, the partial payment of his claim, and other acts of the board recognizing an indebtedness.

Hypothetical questions, founded upon facts, assumed to have been established, were asked by plaintiff's counsel of lawyers to prove, by their opinion, the value of testator's services in the action. *Held*, that the allowance of such questions was not error.

Evidence of an experienced lawyer, and one well acquainted with testator, as to the considerations which gave value to the testator's services, *held* admissible.

Testator's claim for services was presented to the board of directors of the company, and by them referred to a committee. *Held*, that interest on the claim was allowable from that time, and this, notwithstanding no formal account of the debt was made out.

APPEAL from judgment in favor of plaintiff, rendered on report of referee.

Plaintiff's testator, the late Judge Alonzo C. Paige, while a

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director of the New York Central Railroad Company, rendered services as attorney and counselor at law for the said company. After a failure to agree upon the amount of compensation this action was commenced. Upon the death of Judge Paige, Samuel W. Jackson and Edward W. Paige, executors, and Clara K. Paige, executrix, under his will, were substituted as plaintiffs and the action was continued in their names.

The only claim upon which this controversy arises is for services in the action of the people against the defendant to recover canal tolls. The referee allowed \$8,500 for such services.

*M. Hale*, for appellant.

*R. W. Peckham*, for respondent.

BOARDMAN, J. Assuming that the evidence in this case was competent and properly admitted, this court cannot interfere with the referee's estimate of the value of the services rendered by plaintiff's testator. Indeed, upon such assumption there is no ground for saying the amount is excessive. The evidence of the witnesses for the defense is more intelligent, positive and certain than that derived from most of the plaintiff's witnesses. Still, if such evidence was all competent, it was for the referee to weigh it and adjust the amount according to his estimate of its value. He has done so, and has apparently sought and certainly obtained a golden mean equally distant from the views of the respective parties. Such conclusion from conflicting evidence, not unevenly balanced, is conclusive upon this court.

Directors of a railroad company are not entitled to receive compensation for their services while employed in their legitimate and ordinary duties as directors. It is, however, conceded by defendant's counsel, that a director may be entitled to compensation for his personal services beyond the range of his official duties upon an actual employment by the company. The authorities are quite clear upon that proposition. *Chandler v. Monmouth Bank*, 1 Green (N. J.) 255; *Hall v. Vt. & M. R. R. Co.*, 28 Vt. 401; *N. Y. & N. H. R. R. Co. v. Ketchum*, 27 Conn. 170.

In this case no doubt can exist that the professional services rendered were outside and in excess of the ordinary duties of a director; that such services were rendered with the knowledge and at the request of the defendant, as is evinced by the nature of the

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employment, the importance of the subject-matter involved, the action of the board of directors in reference to this claim, the partial payment thereof by defendant alleged in the answer and admitted in the proofs, the qualified admissions of employment and retainer made upon the trial, and the several acts of the board in the nature of a recognition of an indebtedness for these services and ratification of the employment. These circumstances were sufficient to justify the referee in his conclusion, that Mr. Paige was employed by the defendant to render such services as a lawyer and not as a director. Abb. Dig. Corp., tit. Agents, §§ 5, 7, also Ratific., § 28; 286, § 89. It is not deemed indispensable that his employment should be by resolution of the board of directors, so long as the evidence is of such a nature as to justify the finding of the referee of an actual employment and services rendered under it. Abb. Dig. Corp. 3, §§ 7, 9; 5, §§ 21, 26, 27, 28; *Bank of Lyons v. Demmon*, Lator's Sup. to Hill & Denio, 398, 405; *Fisher v. La Rue*, 15 Barb. 323.

Two hypothetical questions founded upon facts assumed to have been established by the evidence were asked by plaintiff's counsel of legal gentlemen to prove by their opinion the value of Mr. Paige's services in the action. It is claimed by the appellant the allowance of such questions was error. No authority is produced to sustain such claim. Against it is the case of *Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 42, directly in point. In the examination of experts, facts are often and necessarily assumed. Indeed, in the majority of such cases, it must be so since the experts have no personal knowledge of the facts upon whose effects, power or influence they are called to give opinion. So long as the facts assumed may be fairly claimed to be within the evidence as produced, the question is not objectionable. *Beekman v. Platner*, 15 Barb. 550. The degree of knowledge of the facts possessed by the witness, or imputed to him by the question, is quite material in estimating the value of testimony. The more intimate his acquaintance with the facts upon which his opinion is founded, the more reliable is his estimate of such value. The more uncertain or imperfect his knowledge, the less value should be attached to his opinion. The referee must judge as to the correctness of the assumption of facts contained in the question and the reliability of an opinion founded thereon. The same considerations should control in the differences of value arising from local consideration of residence of the expert or character and standing at the bar. *Harland v. Lilienthal*, (Ct. of App.), 9 Alb. L.

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J. 125. The value of professional services is made up of so many complex and collateral elements that absolute accuracy is unattainable. No error is apparent in allowing answers to be given to the questions objected to by the defendant.

The evidence of Judge Potter, as to the considerations which gave value to Mr. Paige's services, was clearly proper. It is in accordance with daily practice to ask a witness to describe the peculiarities, the excellencies or the defects of goods or property, as facts which enter into the estimate of value. There is no reason why the same process may not be adopted as to the nature and importance of services rendered, and the character and standing of the person rendering such services. *Harland v. Lilienthal, ante.*

Nor was any error committed in excluding the offer of the State to take a verdict of \$100,000 in full for claims for back tolls. The offer was rejected. The propriety of such rejection was shown by the result. It was an offer of compromise, and, being rejected, no longer constituted a limit of liability. The litigation thenceforth proceeded as if no such proposition had been made. As well might the plaintiffs have offered to prove that fact and its judicious rejection upon their advice, with a view of enhancing the value of the services rendered. An inferior order of ability might have accepted it.

The claim for services appears to have been presented to the board of directors of defendant September 27, 1866, and by such board referred to a committee. The referee has found that the indebtedness of defendant to plaintiffs' testator existed upon the 1st of October, 1866, and thereupon allowed interest from that date upon the debt. In this conclusion he is sustained by the case of *Adams v. Fort Plain Bank*, 36 N. Y. 255, 262. The employment had then ended, and the debt was due. The claim for payment had been made to the company. *Mygatt v. Wilcox*, 45 id. 306, 310. It cannot now be objected that a formal account was not made out, since the defendant accepted the claim made as sufficient, and acted upon it. Though the amount of the claim was unliquidated, the rule should apply if there is an actual breach of contract to pay, and an actual indebtedness due. *Van Rensselaer v. Jewett*, 2 N. Y. 135, 140; *Graham v. Chrystal*, 2 Abb. Ct. of App. 263, 265.

No sufficient reason is apparent why the judgment should be disturbed, and it should therefore be affirmed, with costs.

*Judgment affirmed.*

## ADDENDA.

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HANOVER FIRE INSURANCE COMPANY V. TOMLINSON, appellant.

*Action upon judgment — order allowing not appealable.*

An order giving plaintiff leave to bring an action against defendant upon a judgment for a deficiency upon a foreclosure sale, and for the amount of deficiency appearing by the referees' report in an action between the same parties, *held*, not an appealable order.

*Tomlinson, Winsor and Marsh*, for appellants.

*Tracy, Wait and Olmstead*, for respondents.

PER CURIAM. (First Department.)

The opinion is exceedingly brief, and is contained wholly in the head note.

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LEACH, administrator, etc., v. LEACH, appellant.

*Pleading — joinder of causes of action — evidence — impeachment — rule of interest — exception.*

The complaint contained a claim for moneys arising from the sale of plaintiff's property by defendant, which moneys were applied by defendant to his own use; and also a claim for moneys due upon an express contract. The first named claim was set forth as arising upon contract. *Held*, that the conversion of the moneys raised an implied promise to repay, and that the claim therefor was properly admitted to counterbalance a counter-claim of defendants.

Although a complaint may contain causes of action not properly united, or the complaint is not in accordance with the summons, and no objection is made by motion, but an answer is put in, defendant cannot object at the trial to the introduction of evidence, under either claim in the complaint.

Evidence was offered to show that a witness interposed to prevent a settlement between plaintiff and defendant of the matters in issue. *Held*, not admissible to impeach or discredit such witness. While a witness may be cross-examined to show that he has a feeling hostile to the opposing party, such feeling cannot be proved independently.

Defendant claimed and was allowed for board of plaintiff \$4 per week. *Held*, that there being no evidence that the board was to be paid at the end of each week, the refusal of the referee to compute interest thereon from the end of each week and computing from the end of the year was proper. The rule of interest was a question of law which could be raised only by an exception so specific as to call attention to it.

*James B. Jenkins*, for appellant.

*Henry Barclay*, for respondent.

PARKER, J.

The opinion contains only a review of the evidence and findings of the referee. All the points passed upon are fully noted in the head note, and it is not deemed necessary to publish the opinion at length.

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#### HOLLOWAY, appellant, v. STEPHENS *et al.*

##### *Evidence—contract—measure of damages.*

A contract between an advertiser and an advertising agent, in respect to the insertion of advertisements in various newspapers, contained the following: "And it is distinctly understood and agreed upon by the signer hereof, that the schedule papers must have been in existence as newspapers twelve months, and that no advertisements must be inserted in them of Holloway's preparations, if his advertisement is already therein when offered by said Stephens, or wanting these two essential points, this contract will be null and void." In an action wherein the advertising agent in his answer claimed damages, by reason of the refusal of the advertiser to carry out the contract; *held*, that it was necessary for the advertising agent to show that the papers in which he had been prevented from advertising by plaintiff's repudiation were such as had been in existence "as newspapers" for twelve months, and that "Holloway's preparations" were not already advertised in them. The finding of the referee, was that the advertising agent was entitled to \$185,355.44 damages, declared to be the estimated profits the agent would have received, at the end of two years, if the contract had been fully carried out. The estimate was made upon a total of 217 newspapers, and the gross aggregate of charges, after making certain deductions, was estimated to be \$270,710.88, of which the agent was allowed 50 per cent. There was no proof of the existence of the newspapers; that they had been in existence the time required by the contract; that the advertiser's advertisements were not already in them; that they were ready and willing to insert advertisements as low as the estimated cost of publishing, or that they were permanent, and would have been able to have continued the advertisements for the time stipulated. *Held*, that the measure of damages was



altogether too speculative and conjectural, and that the judgment entered upon the report of the referee should be reversed.

APPEAL from a judgment in favor of defendant, for \$171,237.43, entered upon the report of a referee. The complaint asked that defendant be restrained from continuing or bringing any actions against plaintiff, by reason of any claim, under certain agreements made in behalf of plaintiff, between plaintiff's attorney, who was also joined as defendant, and an advertising agent the other defendant, and asking that such agreements be declared null and void, and demanded an accounting. The advertising agent claimed damages for \$200,000, in his answer.

*S. P. Nash and M. B. Maclay*, for appellants.

*A. J. Vanderpoel and T. B. Eldridge*, for respondents.

DAVIS, J.

The opinion contains only a review of the evidence taken before a referee, and the conclusions noted in the head note, and it is believed unnecessary to publish the same at length.

*Judgment reversed and new trial ordered.*

#### UNION NATIONAL BANK IN NEW YORK V. KUPFER

PLAINTIFF claimed title to an undivided fifth part of a lot of land in the possession of defendant, and formerly held by one Ann Striker. Judgment rendered for defendant, upon the ground that the court of appeals had passed upon the title in question in the cases of *Brewster v. Striker*, 2 N. Y. 19, and *Striker v. Mott*, 28 id. 82.

*R. E. & T. Foot*, for plaintiff.

*Philip F. Smith*, for defendant.

INGRAHAM, P. J.

#### PRICE V. PRICE, appellant.

*Defense — in action to annul marriage — allegations in answer — materiality of*

In an action to annul a marriage between plaintiff and defendant, upon the ground that plaintiff had been previously married, and his wife was living

at the time of his marriage with defendant, but had not been heard from by him, for more than five years; *held*, that it was no defense that defendant was induced to marry plaintiff by his representations that he had the legal right to contract marriage.

It is a proper matter of defense that the former wife was not living at the time of the bringing of the action.

An allegation in the answer that defendant "has not knowledge or information sufficient to form a belief whether S. (the first wife) was living at the commencement of this action," *held*, a material allegation to join issue upon plaintiff's statement that "she is still living."

In the complaint, it was alleged that defendant had knowledge and information of the fact that plaintiff's former wife was living. *Held*, that a denial in the answer of this allegation, though not a perfect defense, was material, and might be necessary, upon the question of costs and alimony.

*John L. Hill*, for appellant.

*Stephen Brown*, for respondent.

P. POTTER, J.

APPEAL from an order of special term, striking out part of the answer. The material points passed upon in the opinion are stated in the head note, and it is not believed necessary to publish the opinion in full.

*Order modified.*

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MISSELBECK v. GREIME, appellant.

*Evidence — admissions.*

A witness for plaintiff, who had testified to an admission by defendant, was asked upon cross-examination: "How much did defendant say he owed plaintiff at that time and in that conversation?" *Held*, that the question was proper, and not in conflict with the rule in *Rouse v. Whitel*, 25 N. Y. 176.

*S. W. Jackson*, for appellant.

*T. S. Westbrook*, for respondent.

P. POTTER, J.

APPEAL from a judgment entered upon the report of a referee. The opinion is devoted to a review of the evidence, and contains nothing of importance for publication not embraced in the head note.

*Judgment affirmed.*

## ANDREWS, appellant, v. RAYMOND.

*Fraudulent deed — undue influence — evidence.*

In an action to set aside a deed, upon the ground of fraud and undue influence, it was shown that the person procuring the deed had strenuously urged the one making it, who was a married woman and of a low grade of intelligence, to do so without consulting her husband or relations. *Held*, that while this was a suspicious circumstance, mere suspicion of undue influence was not enough; it must be proved.

*J. J. Duddleston, Jr., and Amos H. Prescott, for appellant.*

*S. S. Morgan, for respondent.*

MULLIN, P. J.

APPEAL from a judgment entered upon the report of a referee. Judgment affirmed, upon the ground that there being a conflict of testimony, it was for the referee to determine which statements were to be believed. Nothing is contained in the opinion important for publication.

*Judgment affirmed.*

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PERRIN *et al.* v. LEWIS, appellant.*Trial — dismissal of complaint — neglect to request submission to jury.*

Defendant made a draft on plaintiffs. The draft was accompanied by a bill of lading of some cheese consigned to plaintiffs. Plaintiffs accepted and paid the draft, and sold the cheese which did not bring enough to meet the draft. In an action for the deficiency, the defense was that the cheese had been sold to plaintiffs' agent for the amount of the draft. Plaintiffs claimed to have received and sold the cheese on commission. Evidence was given tending to prove the allegations upon each side. *Held*, that a motion to dismiss the complaint was properly denied, and that the defendant not having requested the submission of the case to the jury, could not object on appeal to a verdict for plaintiff, found by direction of the court.

*Fiske & Ballou, for appellant.*

*E. L. Stevens, for respondent.*

MULLIN, P. J.

APPEAL from a judgment and order denying a new trial. The head note contains all that is of any importance in the opinion.

*Judgment affirmed.*

## JOHNS, appellant, v. GUSTIN.

*Evidence — statute of frauds — when objection to void contract must be taken. — warranty — damages.*

In an action to recover the price of a quantity of roofing material, the defense was a breach of warranty. *Held*, that the objection that the warranty being for five years was void, unless in writing, could not be raised for the first time upon appeal to general term. It should have been made at the trial. A witness was asked what a roof would have been worth, if it had been as stated by defendant, and in circular. It did not appear that the circular was issued by plaintiff. *Held*, that the question was improper.

*J. A. Hathway*, for appellant.

*C. Whitney*, for respondent.

MULLIN, P. J.

APPEAL from a judgment entered upon a report of a referee. The opinion contains nothing of importance not noticed in the head note.

WAVERLY PAPER MILLS, appellant v. BRISTOL *et al.*

*Contract — power of steam engine.*

Defendants agreed to furnish a steam engine which would run certain machinery in a mill. *Held*, that if the engine was a fair and merchantable one and did the work agreed to be done, it was sufficient; and such engine need not stand the test of an indicator placed upon it for the purpose of showing its power.

*J. N. Dexter*, for appellant.

*Charles E. Parker*, for respondent.

MILLER, P. J.

APPEAL from a judgment entered upon the report of a referee, in an action for an alleged breach of contract by defendants, to furnish plaintiff a steam engine, etc., sufficient to run the machinery in plaintiff's paper mill.

The main point at issue was the terms of the contract concerning which the evidence was conflicting. The judgment was affirmed, upon the ground that there was no such preponderance of testimony as would justify the reversal of the finding of the referee.

*Judgment affirmed.*

COMSTOCK *et al.* v. WARNER *et al.*, appellant.

*Partnership—statements made by partner—when binding on firm.*

Plaintiffs being requested by K. to sell goods to him on credit asked defendants, a firm in business in the same city with plaintiffs, concerning the responsibility of K., and were told by one of the defendants that the store carried on by K. was a branch of defendant's house. Believing this, plaintiffs gave K. credit. *Held*, that such a statement by one of the partners bound defendant's firm, whether true or false.

*William H. Green*, for appellants.

*Sprague & Gorham*, for respondents.

MULLEN, P. J.

APPEAL from a judgment entered upon the verdict of a jury, and from an order denying a new trial. The judgment was affirmed, on the ground that the evidence was sufficient to require the court to submit the case to the jury. The head note contains all that is important in the opinion.

*Judgment affirmed.*

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SCOTT v. STEVENSON.

PER CURIAM. (Third Department.)

IN this action a new trial was granted, upon the ground that the court below erred in refusing to submit to the jury the question, whether plaintiff was the actual owner of a note, a fact which the testimony left in doubt. There is nothing in the opinion important for publication.

## JOHNS, appellant, v. GUSTIN.

*Evidence—statute of frauds—when objection to void contract must be taken—warranty—damages.*

In an action to recover the price of a quantity of roofing material, the defense was a breach of warranty. *Held*, that the objection that the warranty being for five years was void, unless in writing, could not be raised for the first time upon appeal to general term. It should have been made at the trial. A witness was asked what a roof would have been worth, if it had been as stated by defendant, and in circular. It did not appear that the circular was issued by plaintiff. *Held*, that the question was improper.

*J. A. Hathway*, for appellant.

*C. Whitney*, for respondent.

MULLIN, P. J.

APPEAL from a judgment entered upon a report of a referee. The opinion contains nothing of importance not noticed in the head note.

WAVERLY PAPER MILLS, appellant v. BRISTOL *et al.*

*Contract—power of steam engine.*

Defendants agreed to furnish a steam engine which would run certain machinery in a mill. *Held*, that if the engine was a fair and merchantable one and did the work agreed to be done, it was sufficient; and such engine need not stand the test of an indicator placed upon it for the purpose of showing its power.

*J. N. Dexter*, for appellant.

*Charles E. Parker*, for respondent.

MILLER, P. J.

APPEAL from a judgment entered upon the report of a referee, in an action for an alleged breach of contract by defendants, to furnish plaintiff a steam engine, etc., sufficient to run the machinery in plaintiff's paper mill.

The main point at issue was the terms of the contract concerning which the evidence was conflicting. The judgment was affirmed, upon the ground that there was no such preponderance of testimony as would justify the reversal of the finding of the referee.

*Judgment affirmed.*

COMSTOCK *et al.* v. WARNER *et al.*, appellant.

*Partnership—statements made by partner—when binding on firm.*

Plaintiffs being requested by K. to sell goods to him on credit asked defendants, a firm in business in the same city with plaintiffs, concerning the responsibility of K., and were told by one of the defendants that the store carried on by K. was a branch of defendant's house. Believing this, plaintiffs gave K. credit. *Held*, that such a statement by one of the partners bound defendant's firm, whether true or false.

*William H. Green*, for appellants.

*Sprague & Gorham*, for respondents.

MULLEN, P. J.

APPEAL from a judgment entered upon the verdict of a jury, and from an order denying a new trial. The judgment was affirmed, on the ground that the evidence was sufficient to require the court to submit the case to the jury. The head note contains all that is important in the opinion.

*Judgment affirmed.*

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SCOTT v. STEVENSON.

PER CURIAM. (Third Department.)

IN this action a new trial was granted, upon the ground that the court below erred in refusing to submit to the jury the question, whether plaintiff was the actual owner of a note, a fact which the testimony left in doubt. There is nothing in the opinion important for publication.

## HOPPOUGH, appellant, v. STRUBLE.

*Action — equitable defense to action at law — ejectment.*

Plaintiff, who owned a lot of land, conveyed a part thereof to M. H. Afterward, he sold and conveyed to defendant, by deed, the lot, excepting the part conveyed to M. H., stated to be about four acres. When negotiating the sale, plaintiff informed defendant that a certain fence was the line between him and M. H., and defendant took possession of the land up to the fence. Subsequently, plaintiff acquired title to the land conveyed to M. H., and it was discovered that by a mistake of the surveyor the deed to M. H. embraced upward of ten acres, and that the fence was not upon the line according to that deed.

In an action of ejectment brought by the plaintiff to recover the land embraced in the deed to M. H., *held*, that defendant had a right to maintain an equitable action against plaintiff to have the deed to him (defendant) reformed, and could set up this equitable right as a defense to an action at law without claiming affirmative relief. *Dobson v. Pearce*, 12 N. Y. 156.

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee.

*O. H. Stevens*, for appellant.

*G. F. Danforth*, for respondent.

E. DARWIN SMITH, J.

The head-note contains all that is of importance in the opinion, which it is not believed important to give in full.

*Judgment affirmed.*

## MALONE, administratrix, etc., v. HATHAWAY.

*Negligence — master and servant — duty of master to provide safe structures.*

Plaintiff's intestate, an employee of defendant, while in the discharge of his duty, was killed by the breaking down of a floor in defendant's brewery, upon which stood a mash-tub filled with boiling mash. The evidence tended to show that the floor was rotten, weak and insufficient to support the tub through the negligence of defendant in not making repairs. *Held*, that it was the duty of defendant to furnish a safe structure in which the duties of his servant were to be performed, and it was for the jury to determine whether he had negligently failed to do so. *Lanning v. N. Y. C. R. R. Co.* 49 N. Y. 521; *Plank v. N. Y. C. & H. R. R. Co.*, 1 N. Y. Sup. Ct. 319 *Hoffnagle v. N. Y. C. & H. R. R. Co.*, *id.* 346.



EXCEPTIONS ordered to be heard in the first instance, at the general term after a nonsuit at the circuit.

*W. F. Cogswell*, for plaintiff.

*J. C. Cochrane*, for defendant.

TALCOTT, J.

The opinion merely recites the evidence, and decides the case upon the authority of the cases cited in the head-note.

*New trial ordered.*

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HOWES v. HALL, appellant.

*Evidence — violation of contract — Trial — charge to jury.*

In an action upon a note, given in payment of plaintiff's services as salesman, in 1871, the defense was, that plaintiff had violated his duty while in defendant's employ by selling goods for another establishment in the same business. *Held*, that evidence that the amount of work done in a particular branch of defendant's business in 1871 was less than that done in either 1869 or 1870, the decrease not being shown to be attributable to plaintiff's acts, was inadmissible.

Certain agricultural machines, not kept by defendant, were frequently asked for by defendant's customers. It was shown that plaintiff had told those inquiring that defendant did not keep the machines, but they could be procured at another establishment. *Held*, that the charge of the court at trial that "if the defendant did not manufacture these machines the plaintiff had the right to turn over the orders to other establishments," was not erroneous, taken in connection with the evidence, and the assumption that plaintiff acted in good faith.

APPEAL from a judgment for plaintiff, entered upon the verdict of a jury.

*J. C. Cochrane*, for appellant.

*H. & G. H. Humphrey*, for respondent.

TALCOTT, J.

The opinion is chiefly devoted to a review of the evidence. The only points of any importance passed upon are fully given in the head-note.

*Judgment affirmed.*

## SPOONER V. LEFEVRE, appellant.

*Reference—findings of fact by referee—items of account.*

In an action where the parties had mutual claims against each other on account, the referee made a general finding in favor of the plaintiff, but gave no items of account. *Held*, that the referee should have required the parties to present their accounts in the form of debtor and creditor, and should, in his findings, have stated the items allowed distinctly. *Ketchum v. Clark*, 22 Barb. 819; Code, § 272.

Every judgment rendered by a referee should rest upon facts warranting it, distinctly and explicitly found and stated. *Buckingham v. Payne*, 36 Barb. 81; *Armstrong v. Bricknell*, 2 Lans. 221; *Smith v. Denier*, 23 N. Y. 365.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

*John T. Pingree*, for appellant.

*H. V. Howland*, for respondent.

E. DARWIN SMITH, J.

The opinion is mainly devoted to a consideration of the evidence. The head-note contains the only points of importance passed upon, and it is not believed necessary to give the opinion in full.

*New trial granted.*

PEOPLE *ex rel.* COMMISSIONERS OF HIGHWAYS OF LEE, appellants,  
v. WILSON.

APPEAL from an order made at special term by Mr. Justice HARDIN, refusing to set aside an order of Mr. Justice DOOLITTLE. The last-named order was made September 14, 1870, in an action by one Whitman and others, against O'Connor and others, commissioners of highways, of Lee and Annsville, Oneida county, adjoining towns, and directed the said commissioners to rebuild a bridge which crossed a creek forming a boundary between the towns. Proceedings on the order was stayed, and an appeal taken. The court of appeals sustained the order, and a motion was made at the Oneida special term to compel the carrying out of the order. At the same time, the motion in this proceeding was made. The order was never enforced, and the highway leading over the bridge in question was, in 1871, discontinued by the commissioners of Lee.

The general term declined to hear the appeal, upon the ground that the appeal papers were defective, and the matter was not before the court, but intimated that in case the same was properly before the court the decision of the special term would be sustained.

*J. I. Sayles*, for appellant.

*A. H. Bailey*, for respondent.

TALCOTT, J.

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COOGAN V. MAYOR, ETC., OF NEW YORK.

*Practice — verdict subject to opinion of court at general term.*

On a trial at the circuit, the court directed a verdict for the plaintiffs, subject to the opinion of the court at general term, on a case. The court, at general term, set aside the verdict, upon the ground that plaintiff was not legally entitled to recover. Upon a motion for re-argument, *held* (following *Cobb v. Cornish*, 16 N. Y. 602), that this was simply a mistrial; that the proper course was for the general term to review the proceedings and order a new trial, but the former decision having accomplished the same end a re-argument should be denied.

MOTION for a re-argument in three actions against the same defendant, brought by James Coogan, James Brennan and Michael Dolan, for services as court officers. The court at circuit directed a verdict for plaintiffs, subject to the opinion of the court at general term. An argument was had in May, 1873, after which the verdicts at the circuit were set aside upon the ground that the plaintiffs were not legally appointed to the offices they claimed to hold. An abstract of the opinion at the general term upon that argument, will be found in 9 Alb. Law Jour. 143, *sub nom. Brennan v. Mayor of New York*.

*Franklin Bartlett*, for plaintiffs.

*D. J. Dean*, for defendant.

DAVIS, P. J.

The head-note fully states the point passed upon in the opinion, a publication of which in full is believed unnecessary.

*Motion denied.*

## ROGERS, assignee, etc., appellant, v. SCHMEERSAHL.

*Admission of service — mistake of date.*

An admission of service of notice of the entry of a judgment, although *prima facie* correct as to its date, is by no means conclusive. The presumption arising from it may be overcome by better evidence, showing that the service was actually made one day later than the date of the admission.

APPEAL from an order of the special term dismissing an appeal from a judgment in favor of defendant, upon the ground that the notice was not served in time. Plaintiff's attorney admitted service of the notice of judgment to have been made on the 17th of December, 1872, but showed satisfactory evidence that such notice was actually received on the 18th of that month. The notice of appeal was served January 17, when defendant's attorney refused to receive it, upon the ground that it was too late.

*R. H. Underhill*, for appellant.

*William B. Aitken & Joseph M. Dixon*, for respondent.

Per CURIAM. (First department.)

The opinion is brief, and contains only the proposition contained in the head-note.

*Order reversed.*

## WHITMORE, appellant, v. VAN, STEENBERGH.

*Order of arrest — false representations.*

An order of arrest was granted, upon affidavits showing that credit for goods was given to the defendant upon representations as to his financial condition, and that his property was unincumbered; which representations were untrue. *Held*, that the order was properly granted.

The defendant moved to vacate the order of arrest, upon affidavits denying the making of the representations, and setting up a special partnership agreement between himself and the plaintiff, the existence of which was denied by the latter, and his denial was corroborated by three witnesses. The defendant failed to establish the making of the agreement, or a course of dealing under it. *Held*, that under these circumstances a motion to vacate the order of arrest should be denied.

APPEAL from an order of the court at special term vacating an order for the arrest of defendant.

*Charles H. Smith, Jr.*, for appellant.

*John N. Lewis*, for respondent.

BARBETT, J.

The opinion contains only a review of the evidence, and a statement of the conclusions set forth in the head-notes, and it is not believed important to publish it in full.

*Order reversed.*

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SMITH *et al.* v. TYLER *et al.*, appellants.

*Trial — nonsuit — Custom.*

Plaintiffs, in their complaint, claimed to have been employed by the defendants as brokers, to sell a vessel. On the trial, plaintiffs failed to show original employment or a ratification of their acts done without authority. *Held*, that plaintiffs should have been nonsuited.

It was claimed by the plaintiffs that it was customary when a vessel was sold through the intervention of a broker, for the seller to pay a commission. *Held*, that if defendants were ignorant of this custom they would not be bound by it.

APPEAL from a judgment in favor of plaintiffs, entered upon the verdict of a jury.

*E. H. Benn*, for appellants.

*Richard H. Huntley*, for respondents.

BARNARD, P. J.

The head-note states fully the matters passed upon in the opinion, which it is believed unnecessary to publish at length.

*Judgment reversed, and new trial granted.*

## HOLMES v. WITTY, appellant.

*Bill of exchange.*

Action upon a bill of exchange, drawn by Robert H. Hall, upon and accepted by the defendant, and payable, four months after date, to the order of the plaintiffs. The answer alleged that the bill was not accepted for value, and that plaintiffs and Hall conspired to procure the acceptance, for the purpose of defrauding the defendant. The referee found that the said bill of exchange was accepted by the defendant for value, and, so accepted, was taken by the plaintiffs in payment for goods by them manufactured and sold and delivered to said Hall, to the amount of the sum named in the bill of exchange; that the said indebtedness had become due and payable before the date of the bill; that the said goods were used by Hall under an agreement with the defendant, whereby said defendant agreed to take the management and control of the sale of certain sleigh bells, and was to be allowed to make his draft on said defendant to the extent of the first cost of all goods sold, and that the bill of exchange was drawn and accepted for the first cost of said goods; that there was a good consideration for the making and acceptance of the said bill of exchange between said Hall and said defendant, and that there was no conspiracy between plaintiffs and Hall. *Held*, that the testimony sustains the findings of fact, and there are no valid exceptions to the admission of evidence. The case of *Central Bank v. Hammett*, 50 N. Y. 158, is not in point. There the bill of exchange was received by the holder from the drawees. The presumption of law being that the drawee is indebted to the drawer, there was no apparent right in the drawee to discount the bill for his own benefit; and the real fact in that case was in accordance with the presumption of law. In the case at bar, the plaintiffs received the bill from the drawer, who was both the apparent and the real owner. The bill was accepted by the defendant for the express purpose of being transferred to the plaintiffs. The referee finds it was so transferred upon a good consideration. But even if the original consideration was defective there was nothing to put plaintiffs upon inquiry. It is said they had notice that monthly statements had not been supplied to defendant as agreed; but that right was waived when defendant accepted the bill.

APPEAL from a judgment in favor of the plaintiffs, entered upon the report of a referee.

*Crooke, Bergen & Clement*, for appellant.

*James S. Stearns*, for respondent.

PRATT, J., delivered the opinion, which is given in full in the head-note.

*Judgment affirmed.*

McCoy, appellant, v. O'Donnell *et al.*

*Foreclosure — tender before action brought — Judgment — costs.*

In an action to foreclose a mortgage, defendants pleaded tender of the amount due before action brought. This defense was established upon the trial. *Held*, that the plaintiff was not entitled to a judgment of foreclosure, but to a money judgment against the defendants diminished by the costs of the defendants.

APPEAL from a judgment entered upon the report of Francis Rising, Esq., referee.

*George Day and R. A. Parmenter*, for appellant.

*Flagg & Neary and M. I. Townsend*, for respondents.

Per CURIAM. (Third department.)

The opinion is devoted to a review of the evidence. All that is important for publication is embodied in the head-note.

*Judgment affirmed.*

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HOOGLAND, appellant, v. HOOGLAND.

APPEAL from the decision of the surrogate of Queens county, admitted to probate the will of Eliza Hoogland, deceased.

*Edmund Yenni and Jesse C. Smith*, for appellant.

*C. A. S. Van Nostrand*, for respondent.

BARNARD, P. J.

The only questions involved are of fact in regard to the execution of the will and codicils thereto. The decision of the surrogate was reversed, and the case sent to a jury of Queens county for trial.

FISHER v. LIBBY, appellant.

*Damages — on breach of contract of sale.*

Plaintiff sold, and partly delivered some damaged paper to defendant. Defendant refused to receive the balance, whereupon, plaintiff, after notice to defendant, sold the same at public auction. *Held*, that this method of ascertaining the damage was legal. *Pollen v. Leroy*, 30 N. Y. 549.

APPEAL from a judgment entered upon the report of a referee.

*Charles M. Da Costa* and *T. P. Chapman*, for appellant.

*Morris & Pearsall*, for respondent.

BARNARD, P. J.

The opinion holds that the referee was justified by the evidence in his findings of fact. The only question of law noticed in the union, is fully set forth in the head-note.

*Judgment affirmed.*

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LESTER, assignee, etc., v. ROME, WATERTOWN & OGDENSBURG  
RAILROAD COMPANY, appellant.

*Appeal from county court — practice on.*

Upon appeal from a judgment in a county court, it did not appear from the appeal papers that the case had been presented to the county court or that any motion or order had been made thereon in that court. *Held*, that the general term could not review the judgment, and the appeal must be dismissed.

APPEAL from a judgment of the Oswego county court entered upon the report of a referee, in an action originating in a justice's court.

*Wynn & Porter*, for appellant.

*N. B. Smith*, for respondent.

Per CURIAM. (Fourth department.)

The only point in the opinion is fully set forth in the head-note.

*Appeal dismissed.*



GRISWOLD, commissioner, etc., v. BULLER, appellant.

*Appeal—proceedings for highway encroachments.*

In proceedings before justices of the peace in respect to encroachments upon highways, under the provisions of the Revised Statutes, part 1, chap. 10, art. 5, § 103, as modified by Laws 1862, chap. 243, appeals are governed by the provisions of the Code relating to appeals from judgments rendered by justices of the peace, and in such appeals the court, in its review, is limited to the grounds of appeal contained in the notice served on the respondent.

APPEAL from a judgment of the Chautauqua county court affirming a judgment of a justice of the peace in a proceeding in respect to an alleged encroachment made by the appellant upon a highway, in the town of Sheridan, in said county.

*Morris & Russell*, for appellant.

*Murray & Pattison*, for respondent.

E. DARWIN SMITH, J.

The only question of law passed upon in the opinion is set forth in the head-note. The opinion is chiefly devoted to a consideration of the facts.

*Judgment affirmed.*

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HALSTEAD v. HALSTEAD *et al.*

*Costs—on appeal—between defendants in partition suit.*

In an action for partition, one of the defendants appealed from an order therein to the general term, where the order was affirmed, and to the court of appeals, where the appeal was dismissed. One of the other defendants was an infant, who appeared by a guardian and put in a general answer. The infant's interests were identical with those of the plaintiff, and the guardian was represented during the whole litigation by the same counsel as the plaintiff. *Held*, that the guardian was not entitled to costs as against the appealing defendant, upon the appeal to the court of appeals, in the absence of an explicit direction of that court granting him costs.

APPEAL from an order of the special term, denying an application by the guardian of an infant defendant for costs upon an appeal made by his co-defendant.

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BAERNARD, P. J.

The substance of the opinion, and the only point passed upon therein, are given in the head-note.

*Order affirmed.*

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SOUTHARD v. WRIGHT, appellant.

*Statute construction — Laws 1871, chap. 639 — grant of oyster beds.*

By Laws 1871, chap. 639, the board of town auditors of either Hempstead or Jamaica, Queens county, may grant to residents of those towns the occupancy of lands under water, for oyster planting. By the statute the applicant is required to prove to the board, among other things, by five "freeholders," that he is and has been for one year preceding an "inhabitant of the town." The proof is required to be taken in writing, and signed and sworn to, whereupon the board may grant permission to occupy; the certificate of which, and the depositions, are directed to be filed in the town clerk's office. *Held*, in an action by one holding a certificate, for a penalty provided by the act for taking oysters without authority on lands granted, that the proof required by the act is common-law proof. 6 How. 96. The witnesses of the facts should be produced before the board, sworn and examined; and an affidavit taken before one of the justices who was one of the board did not give the board jurisdiction to grant the right of occupancy.

APPEAL from a judgment of Queens county court, affirming a judgment of a justice's court against defendant for a penalty.

*G. A. Mott and A. J. Spooner*, for appellant.

*Alexander Hagner*, for respondent.

BAERNARD, P. J.

The action was for a penalty under a local act having application only to the towns of Jamaica and Hempstead, Queens county. The opinion is mostly devoted to a consideration of the facts, and the head-note contains all that is believed to be of importance for publication.

*Judgment reversed.*

BARNES v. STOUGHTON *et al.**Foreclosure—opening sale.*

In an application for a re-sale of mortgaged premises upon the ground that the premises sold did not bring their full value, the moving affidavits showed, not what was the true market, but a speculative value. *Held*, that a re-sale should not be ordered.

APPEAL from an order of the special term denying a motion by one of the purchasers at a foreclosure sale, for a re-sale of the mortgaged premises.

*Wakeman & Latting*, for the purchaser.

*Otis T. Hall*, for the creditors.

*James R. Marvin*, for plaintiff.

TAPPEN, J.

The premises had, under the judgment of foreclosure, been sold three times, and the sale opened twice. Upon the third sale the manner of sale was agreed upon by all parties. The opinion is chiefly devoted to a consideration of facts, and the judgment of the special term was affirmed on the ground that such facts did not warrant an opening of the sale. The head-note gives all of value for publication.

*Order affirmed.*

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O'GARA, administratrix, etc., appellant, v. CLARKIN *et al.**Administratrix—payments by—estoppel.*

Plaintiff, the administratrix of an estate, solely through great skill and labor both before and after her appointment, secured certain moneys belonging to the estate, and, under advice of counsel, and in good faith, paid certain charges which were reasonable for the services of others in securing such moneys. *Held*, that she should be allowed for the charges paid, and for her disbursements on behalf of the estate, including those made before her appointment. *Held*, also, that those who had made claims upon the administratrix for services were estopped from denying that their claims were just.

## SPOONER V. LEFEVRE, appellant.

*Reference—findings of fact by referee—items of account.*

In an action where the parties had mutual claims against each other on account, the referee made a general finding in favor of the plaintiff, but gave no items of account. *Held*, that the referee should have required the parties to present their accounts in the form of debtor and creditor, and should, in his findings, have stated the items allowed distinctly. *Ketchum v. Clark*, 22 Barb. 819; Code, § 272.

Every judgment rendered by a referee should rest upon facts warranting it, distinctly and explicitly found and stated. *Buckingham v. Payne*, 36 Barb. 81; *Armstrong v. Bricknell*, 2 Lans. 221; *Smith v. Denier*, 23 N. Y. 365.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

*John T. Pingree*, for appellant.

*H. V. Howland*, for respondent.

E. DARWIN SMITH, J.

The opinion is mainly devoted to a consideration of the evidence. The head-note contains the only points of importance passed upon, and it is not believed necessary to give the opinion in full.

*New trial granted.*

PEOPLE *ex rel.* COMMISSIONERS OF HIGHWAYS OF LEE, appellants,  
v. WILSON.

APPEAL from an order made at special term by Mr. Justice HARDIN, refusing to set aside an order of Mr. Justice DOOLITTLE. The last-named order was made September 14, 1870, in an action by one Whitman and others, against O'Connor and others, commissioners of highways, of Lee and Annsville, Oneida county, adjoining towns, and directed the said commissioners to rebuild a bridge which crossed a creek forming a boundary between the towns. Proceedings on the order was stayed, and an appeal taken. The court of appeals sustained the order, and a motion was made at the Oneida special term to compel the carrying out of the order. At the same time, the motion in this proceeding was made. The order was never enforced, and the highway leading over the bridge in question was, in 1871, discontinued by the commissioners of Lee.

The general term declined to hear the appeal, upon the ground that the appeal papers were defective, and the matter was not before the court, but intimated that in case the same was properly before the court the decision of the special term would be sustained.

*J. I. Sayles*, for appellant.

*A. H. Bailey*, for respondent.

TALCOTT, J.

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COOGAN V. MAYOR, ETC., OF NEW YORK.

*Practice — verdict subject to opinion of court at general term.*

On a trial at the circuit, the court directed a verdict for the plaintiffs, subject to the opinion of the court at general term, on a case. The court, at general term, set aside the verdict, upon the ground that plaintiff was not legally entitled to recover. Upon a motion for re-argument, *held* (following *Cobb v. Cornish*, 16 N. Y. 602), that this was simply a mistrial; that the proper course was for the general term to review the proceedings and order a new trial, but the former decision having accomplished the same end a re-argument should be denied.

MOTION for a re-argument in three actions against the same defendant, brought by James Coogan, James Brennan and Michael Dolan, for services as court officers. The court at circuit directed a verdict for plaintiffs, subject to the opinion of the court at general term. An argument was had in May, 1873, after which the verdicts at the circuit were set aside upon the ground that the plaintiffs were not legally appointed to the offices they claimed to hold. An abstract of the opinion at the general term upon that argument, will be found in 9 Alb. Law Jour. 143, *sub nom. Brennan v. Mayor of New York*.

*Franklin Bartlett*, for plaintiffs.

*D. J. Dean*, for defendant.

DAVIS, P. J.

The head-note fully states the point passed upon in the opinion, a publication of which in full is believed unnecessary.

*Motion denied.*



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| ACKNOWLEDGMENT — <i>Insufficient certificate.</i> ] The acknowledgment of a deed was this: "Personally appeared before me, Robert S. Livingston, signer and sealer of the foregoing instrument, and acknowledged the same to be his free act and deed before me." <i>Held</i> , insufficient.<br>MILLER v. LINK.....                                                                                                                                                                                                                                                                                                            | 86    |
| 2. ———, The acknowledgment of a deed must show, that the party acknowledging the instrument was known, or proved, to the officer to be the party named in, and who had executed the same. <i>Ib.</i>                                                                                                                                                                                                                                                                                                                                                                                                                            |       |
| ACTION — <i>Against sheriff — demand.</i> ] A demand is not necessary before bringing action against a sheriff for moneys collected by him upon execution, and which he retains in his hands. The Code has not changed the rule in this respect.<br>NELSON v. KERR.....                                                                                                                                                                                                                                                                                                                                                         | 299   |
| 2. ———, <i>Statutory construction — Code, § 291.</i> ] The provision of § 291 of the Code, that "existing provisions of law not in conflict," etc., "shall apply to executions," etc., refers to the law as established by the courts, as well as that established by the legislature. <i>Ib.</i>                                                                                                                                                                                                                                                                                                                               |       |
| 3. ———, <i>Upon judgment — order allowing not appealable.</i> ] An order giving plaintiff leave to bring an action against defendant upon a judgment for a deficiency upon a foreclosure sale and for the amount of deficiency appearing by the referee's report in an action between the same parties, <i>held</i> , not an appealable order.<br>HANOVER FIRE INS. CO. v. TOMLINSON.....                                                                                                                                                                                                                                       | 657   |
| 4. ———, <i>costs of former action unpaid — stay of proceedings.</i> ] H. brought action against G. and others, to have set aside as fraudulent the conveyance of certain real estate to G. The complaint was dismissed as to G., with costs against H. Afterward G. sold the real estate to D., and H. assigned his claim to plaintiff, who brought action upon the same subject-matter as the former suit against D., G. and others. <i>Held</i> , that the defendants D. and G. were entitled to have the proceedings in this action stayed as to both, until the costs of the former action were paid.<br>HILL v. GRANT..... | 467   |
| 5. ———, <i>By administrator — upon a judgment — leave of court to sue.</i> ] An action brought by an administrator upon a judgment recovered by his intestate, is not "between the same parties," within the meaning of section 71 of the Code, requiring leave of the court to sue.<br>SMITH v. BRITTON.....                                                                                                                                                                                                                                                                                                                   | 498   |
| 6. ———, <i>equitable defense to action at law — ejectment.</i> ] Plaintiff, who owned a lot of land, conveyed a part thereof to M. H. Afterward, he sold and conveyed to defendant, by deed, the lot, excepting the                                                                                                                                                                                                                                                                                                                                                                                                             |       |

ACTION — *Continued.*

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part conveyed to M. H., stated to be about four acres. When negotiating the sale, plaintiff informed defendant that a certain fence was the line between him and M. H., and defendant took possession of the land up to the fence. Subsequently, plaintiff acquired title to the land conveyed to M. H., and it was discovered that by a mistake of the surveyor the deed to M. H. embraced upward of ten acres, and that the fence was not upon the line according to that deed. In an action of ejectment brought by the plaintiff to recover the land embraced in the deed to M. H., *held*, that defendant had a right to maintain an equitable action against plaintiff to have the deed to him (defendant) reformed, and could set up this equitable right as a defense to an action at law without claiming affirmative relief.

HOPPOUGH v. STRUBLE..... 664

*See* APPEAL, 1; INSURANCE, 8; CERTIORARI; DIVORCE.

ADJOINING LANDS: *See* REAL PROPERTY.

ADMINISTRATOR — *payments by — estoppel.*] Plaintiff, the administratrix of an estate, solely through great skill and labor both before and after her appointment, secured certain moneys belonging to the estate, and, under advice of counsel, and in good faith, paid certain charges which were reasonable for the services of others in securing such moneys. *Held*, that she should be allowed for the charges paid, and for her disbursements on behalf of the estate, including those made before her appointment. *Held*, also, that those who had made claims upon the administratrix for services were estopped from denying that their claims were just.

O'GARA v. CLARKIN..... 675

*See* ACTION, 5.

ADMISSION — *of service — mistake of date.*] An admission of service of notice of the entry of a judgment, although *prima facie* correct as to its date, is by no means conclusive. The presumption arising from it may be overcome by better evidence, showing that the service was actually made one day later than the date of the admission.

ROGERS v. SCHMERSAHL..... 668

*See* EVIDENCE, 22; MISTAKE OF FACT, 2.

ADVERSE POSSESSION — *what constitutes.*] In order to constitute adverse possession which will avoid a deed given during its existence, it is not necessary that the occupant should have declared he was holding adversely. If he claims under a title that is adverse to the one giving the deed, it is enough.

CHRISTIE v. GAGE..... 344

ADVERSE USER: *See* DEMURRER, 2.AGENCY — *Principal and agent — special agency — husband and wife.*]

The husband and the son of plaintiff were indebted to the defendant for moneys wrongfully converted. The husband procured from the plaintiff a deed conveying real estate owned by her to defendant. The deed was executed and acknowledged by the wife, and given by her to the husband at his request. No directions were given by her to him as to what he should do with it. The consideration expressed in the deed was \$25,000. The husband gave the deed to defendant, by whom it was accepted as payment of the indebtedness. *Held*, that the husband was merely the special agent of the wife and she was not bound by his acts beyond the limits of the authority conferred, which did not permit him to deliver the deed in settlement of his own indebtedness, and it was the duty of the defendant to ascertain and know the extent of the powers of such special agent.

HOFFMAN v. TREADWELL..... 57



AGENCY — *Continued.*

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2. ———, *Presumptions of fact.*] The utmost that could be inferred from the possession of the deed was, that the husband had authority to sell the property described in it for the consideration expressed to be paid to him as his wife's agent. *Ib.*
8. ———, *Authority of general agent.*] It appeared that the amount of sales in plaintiff's business in New York did not exceed \$50,000 per annum. *Held*, that it was not within the apparent scope of the authority of plaintiff's agent having general charge of his business in New York to enter into contracts for advertising plaintiff's business in Mexico, the West Indies and South America at an expense of over \$180,000 a year.  
HOLLOWAY v. STEPHENS..... 563  
*See EVIDENCE, 1, 2; INSURANCE, 18, 17.*

AGREEMENT: *See CONTRACT.*

ALLUVIUM: *See BOUNDARY.*

AMENDMENT: *See PLEADING, 1.*

- ANIMALS — *Vicious horse — habit of pulling.*] Defendant owned a mare, which had a habit of suddenly "pulling" back upon her halter when excited or restless. This habit was known to defendant. He left the mare at a hotel, kept by plaintiff's employer, to be cared for, giving plaintiff no notice of the habit. While plaintiff was hitching the mare in the stable, and in doing so, had put her halter rope through a ring, she pulled suddenly back, drawing the rope through the ring. Plaintiff's finger was caught between the rope and ring, and torn to pieces. *Held*, that defendant was not bound to notify plaintiff of the habit of the mare to pull.  
KESHAN v. GATES..... 288

2. ———, *When owner liable.*] Where the vicious habit of the animal is directly dangerous, such as kicking or biting in a horse, hooking in a horned animal, or biting in a dog, the owner, if it is known to him, is bound to notify those dealing with the animal of such habit, but it is otherwise when the habit is not such as will directly inflict injury. *Ib.*
3. ———, *Evidence.*] A witness for defense, on cross-examination, testified that he heard the mare was a puller before the accident in question. He also testified as to what defendant's son had said upon the subject of the mare's pulling. *Held*, that the evidence was inadmissible. *Ib.*

ANSWER — *after demurrer.*] Defendant demurred to the complaint, and the demurrer being overruled did not appeal, but answered setting up the same ground argued in the demurrer. *Held*, that the decision of the demurrer did not preclude him from doing so, or estop the court from again considering the question.  
SMITH v. BRITTON..... 498  
*See PLEADING, 1, 3, 5, 6, 7; DEFENSE.*

APPEAL — *Review in equity actions.*] In equity actions the court will always look at the entire case, and see whether substantial justice has been done, and where that appears, it will affirm the judgment, notwithstanding the admission of testimony which, in ordinary actions at law, might have necessitated a new trial.  
PLATT v. PLATT..... 25

2. ———, *From county court — failure to move for new trial.*] Defendant appealed from a judgment entered in the county court upon the verdict of a jury, without moving for a new trial in that court. *Held*, irregular and the appeal dismissed.  
DAHASH v. FLANDERS..... 445

APPEAL — *Continued.*

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8. ———, *From county court—practice on.*] Upon appeal from a judgment in a county court, it did not appear from the appeal papers that the case had been presented to the county court, or that any motion or order had been made thereon in that court. *Held*, that the general term could not review the judgment, and the appeal must be dismissed.  
LESTER v. R. W. & O. RAILROAD CO. .... 672

4. ———, *Proceedings for highway encroachments.*] In proceedings before justices of the peace in respect to encroachments upon highways, under the provisions of the Revised Statutes, part 1, chap. 10, art. 5, § 103, as modified by laws 1862, chap. 243, appeals are governed by the provisions of the Code relating to appeals from judgments rendered by justices of the peace, and in such appeals the court in its review is limited to the grounds of appeal contained in the notice served on the respondent.

GRISWOLD v. BULLER. .... 673

*See* ACTION, 3; COSTS; INNKEEPER, 2; PRACTICE, 3, 12, 13; REFERENCE, 3.

APPEALABLE ORDER: *See* ACTION, 3; COMMISSION; FORECLOSURE, 1; MORTGAGE, 6; PRACTICE, 12.

APPLICATION OF MONEYS: *See* CONTRACT, 2.

APPRENTICESHIP — *N. Y. Juvenile Asylum—indenture to person out of State.*] An indenture of a minor to service in a trade or employment for the period of his minority, executed by the New York Juvenile Asylum to a resident of Illinois, with the written consent of the minor's mother, after a previous surrender by her of the child to the custody and control of the asylum for and during his minority, constitutes a legal contract for binding the child to an employment, where it appears that such indenture contains all the covenants for the minor's benefit required by the laws of Illinois, and conforms to the laws of this State.

PEOPLE *ex rel.* SPLAIN v. NEW YORK JUVENILE ASYLUM. .... 475

2. ———, *Constitutional law.*] The act (Laws 1851, ch. 382) incorporating the New York Juvenile Asylum, and the acts amending the same (Laws 1854, ch. 387; 1866, ch. 245), by which power is given to the asylum to bind out or indenture the children committed to its charge as apprentices, etc., to some profession, trade or employment, in any State of the Union recognizing the validity of such indentures, are valid and constitutional. *Ib.*

ARREST — *What constitutes.*] To constitute an arrest which if unlawful is sufficient to maintain an action for false imprisonment, an actual manual touching of the body is not required, but only whatever is equivalent amounting to a restraint of liberty of the person.

SEARLS v. VIETS. .... 224

2. ———, In an action for false imprisonment it appeared that R., a constable, having a warrant for plaintiff and his sons, issued by a justice, met the plaintiff and one of his sons in a wagon. R. said: "I have a warrant for you and your two sons." Plaintiff asked for what. R. replied, "for stealing pumpkins." Plaintiff started to get out of the wagon, and R. said: "You can go home and get your horses put up and take your tea and come down." Plaintiff went home, took his tea, employed a lawyer, and with him and his two sons went to R.'s, and calling out R., said, "Here's your prisoners." R. said "You move on and I will overtake you." They went on, and R. overtook them as they got to the house of the justice. The matter was then, after discussion, adjourned to another day, without bail, and on the adjourned day the plaintiff appeared, an examination was had, and the justice dismissed the case. *Held*, that the evidence showed an arrest of the plaintiff. *Ib.*

**ARREST AND BAIL — order of arrest.]** An order was granted, upon affidavits showing that credit for goods was given to the defendant upon representations as to his financial condition, and that his property was unincumbered; which representations were untrue. *Held*, that the order was properly granted.

WHITMORE v. VAN STEENBERGH..... 668

2. ———, *false representations.*] The defendant moved to vacate the order of arrest, upon affidavits denying the making of the representations, and setting up a special partnership agreement between himself and the plaintiff, the existence of which was denied by the latter, and his denial was corroborated by three witnesses. The defendant failed to establish the making of the agreement, or a course of dealing under it. *Held*, that under these circumstances a motion to vacate the order of arrest should be denied. *Ib.*

*See* SHERIFF.

**ASSESSMENT — validity of — New York city — street pavement — publication of notice.]** Avenue B, in the city of New York, was paved under a resolution ordinance of the common council. Such ordinance was properly published according to law. The assessment for paving was never confirmed by the common council, but was confirmed by the board of revision and correction of assessments, created by Laws of 1861, chapter 308. Notice of the assessment was not published in strict accordance with Laws of 1841, chapter 171, § 1, although it was published in a large number of city newspapers; *Held* (INGRAHAM, P. J., dissenting), that by the proper publication of the resolution ordinance, which publication was a mandatory requirement of the statute, general jurisdiction of the subject-matter was acquired. All subsequent provisions of the statute relating to the form or manner of execution, or incident thereto, are directory, and in this class are the provisions relating to the publication in question, and the assessment was valid.

PETITION OF FOLSOM..... 55

*See* NEW YORK CITY, 1; RAILROAD AID BONDS.

**ASSIGNMENT — for benefit of creditors — bankrupt law.]** The statute of 1860 (chap. 348), in relation to assignments for the benefit of creditors, is not an insolvent law, and is not interfered with by the bankrupt law.

THRASHER v. BENTLEY..... 309

2. ———, *Collection of debts by assignee.*] The collection of assigned choses in action, by the assignee, is not a conversion of them within the meaning of § 3 of the act of 1860. *Ib.*

*See* ESTOPPEL, 1.

**ASSIGNMENT FOR BENEFIT OF CREDITORS: See** STATUTE OF LIMITATIONS, 8.

**ATTACHMENT — bankruptcy proceedings.]** In December, 1869, plaintiffs attached property belonging to defendants. The attachment lien was dissolved by defendants giving an undertaking in pursuance of the statute. The action in which the attachment was issued was defended, and, pending its continuance, in October, 1872, defendants were adjudicated bankrupts. Upon a motion to stay proceedings in the action until defendants' discharge in bankruptcy, *held*, that more than four months having elapsed, the attachment could not be invalidated under section 14, U. S. Bankrupt Law, and that the result of the attachment was a vested right, subject only to the right of the debtor to substitute an undertaking prescribed by law.

HOLYOKE v. ADAMS..... 1

2. ———, *undertaking.*] *Held*, also, that the sureties in the undertaking, having assumed the payment of the debt alleged, when established, in consideration of the delivery of the attached property, became the

ATTACHMENT—*Continued.*

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debtors of the plaintiffs, on condition that their demand was proven and judgment obtained, and the plaintiffs were entitled to prosecute the action to judgment, notwithstanding the proceedings in bankruptcy. *Ib.*

8. ———, *undertaking in—court may control.*] An attachment was issued upon an undertaking in the sum of \$1,000, and over \$100,000 was seized thereunder. *Held*, that the court has power to regulate and control undertakings given in applications for provisional remedies, and could in this case require an additional undertaking for a larger sum.

WHITNEY *v.* DENISTON ..... 471

ATTORNEY: *See* EMPLOYEE.

ATTORNEY AND CLIENT—*agreements between—when equity will not enforce.*] Defendant agreed in writing to give plaintiff, who was her attorney in certain actions against her husband, one-third of the amount realized from such actions for his services and disbursements for counsel, etc. It appeared that plaintiff instituted the actions for the purpose of harassing the husband into a settlement, which purpose he accomplished by vexatious and annoying legal proceedings. Previous to making the agreement defendant had paid plaintiff for his services, etc., \$625, and under a decree entered upon the settlement, \$1,500 was allowed to the counsel employed by plaintiff, which was paid by the husband. *Held*, that equity would not interfere to enforce the agreement made by defendant, but would leave plaintiff to his action at law.

BURLING *v.* KING ..... 545

*See* FRAUDULENT CONVEYANCE, 2, 3, 4.

AUDIT: *See* COUNTIES, 2.

BAILEMENT; *See* CONTRACT, 5.

BANKRUPTCY—*conflict of jurisdiction.*] Whether the provision of section 14 of the Bankrupt Law relating to the dissolution of process issued by State courts is constitutional, *quære?*

HOLYOKE *v.* ADAMS ..... 1

2. ———, *Conflict of jurisdiction—proceedings in State courts against bankrupt.*] M. brought action against defendants, a banking firm, and attached certain property. Subsequently A., a special partner in the firm, commenced an action for dissolution and accounting, and a receiver was appointed, and in due time a decree made dissolving the partnership. Afterward a petition in bankruptcy was filed, and defendants declared bankrupts. Upon an application for an order for the receiver to turn over the assets of the firm in his hands to the assignee in bankruptcy: *Held*, that the proceeding in bankruptcy did not deprive this court of authority in the matter. This court and its receiver having first obtained possession of the property and control of the litigation, had the right to finish its proceedings before being interfered with by any other jurisdiction. *Held*, also, that, under the bankrupt law, the attachment of M. constituted a valid lien in preference to the claim of the assignee in bankruptcy.

APPLETON *v.* BOWLES ..... 568

*See* ASSIGNMENT, 1; ATTACHMENT, 1, 2.

BILL OF LADING: *See* CONSIGNOR AND CONSIGNEE, 1.

BILL OF SALE: *See* FRAUDULENT CONVEYANCE, 2, 3.

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BOUNTIES: *See* TOWNS.

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| BOUNDARY — <i>margin of artificial pond — alluvium.</i> ] Defendant's lands were bounded by the high-water line of an artificial pond. <i>Held</i> , that the soil formed by natural accretions, deposited along the shore by the water, belonged to him.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |     |
| COOK v. McCLURE.....                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | 484 |
| CANALS — <i>Surrender of contract to repair — Laws 1870, chap. 55.</i> ] Upon a claim for compensation for permanent improvements by a canal contractor, who had surrendered his contract, under Laws 1870, chap. 55, §§ 4 and 5, there was evidence before the canal board that among other things new piers had been built, and old piers and dams and the tow-path, raised above their original height; feeders built, and new lock-gates put in. The claimant had an award for much less than the alleged permanent repairs had cost. <i>Held</i> , upon <i>certiorari</i> , affirming the proceedings of the canal board, that the court could not say that the repairs in question were not permanent, nor that the board had adopted an erroneous principle of compensation. |     |
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CERTIFICATE: See ACKNOWLEDGMENT; CONTRACT, 10; HIGHWAYS, 5; RAILROAD AID BONDS, 8.

CERTIORARI — *a special proceeding — abatement — construction of statute — overseer of the poor.*] An overseer of the poor of a town, as relator,

CERTIORARI. — *Continued.*

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obtained a common-law writ of certiorari to review proceedings in a bastardy case instituted by him. After the writ was served and return thereto made, his term of office expired. *Held*, that the certiorari was a special proceeding and not an "action" or "suit" under the provisions of 2 R. S. 474, § 100 (relating to suits by or against certain officers), and his successor in office could not be substituted as relator.

PEOPLE *ex rel.* WICKS *v.* OSWEGO CO. COURT OF SESSIONS..... 431

CHARGE TO JURY: *See* EVIDENCE, 26.

CHURCH PROPERTY: *See* DEVISE.

CLAIM AND DELIVERY: *See* INNKEEPER, 2.

## CODE OF CIVIL PROCEDURE:

§ 64, 176; § 71, 499; § 72, 503; § 95, 371; § 97, 518; § 118, 26; § 121, 322; § 135, 494; § 150, 534; § 167, 444; § 173, 117, 177, 487; § 174, 473, 487, 520; § 175, 487; § 176, 487, 496; § 177, 487; § 186, 622; § 191, 622; § 201, 621; § 230, 473; § 241, 473; § 253, 503; § 267, 506; § 288, 443, 500; § 284, 443; § 287, 543; § 289, 301; § 290, 301; § 291, 301; § 303, 546; § 308, 539; § 309, 539; § 314, 542; § 366, 176; § 371, 584; § 376, 443; § 349, 519, 539, 556; § 428, 442; § 487, 24; § 433, 24; § 469, 503.

COMMISSION — *to take testimony out of State — joining of issue — appealable order.*] When issue is joined as to one of several defendants, a commission may be issued to take testimony out of State, although issue is not joined as to all the defendants. An order granting a commission in such a case is not appealable.

TREADWELL *v.* POMEROY..... 470

*See* EMINENT DOMAIN; PRACTICE, 12.

COMMON CARRIER — *delivery by to wrong person.*] Defendants, common carriers, delivered by mistake, to a person who had no authority to receive them, goods shipped by and consigned to plaintiff. *Held*, that they were liable to the plaintiff for the value of such goods.

BUSH *v.* ROMER ..... 597

2. — *Right to exclude person conducting express business on passenger boat.*] Plaintiff insisted upon carrying on an express business upon defendants' passenger boat, carrying a carpet bag containing express packages sent between the places where the boat ran, and also taking orders while on the boat for the delivery of passengers' baggage. *Held*, that the ejection of plaintiff from defendants' boat, for persisting in the transaction of his business, and the subsequent refusal of defendant to carry plaintiff otherwise than as a passenger, were justifiable.

BARNEY *v.* OYSTER BAY, ETC., STEAMBOAT CO..... 598

COMMON SCHOOLS: *See* SCHOOL LAW.

COMPLAINT: *See* LIBEL; PLEADING, 2, 8.

COMPUTATION OF INTEREST: *See* INTEREST, 2, 3.

CONDITION PRECEDENT: *See* CONTRACT, 8, 12.

CONFLICT OF LAW — *foreign judgment.*] The existence of a judgment in a court of South Carolina, decreeing payment of a mortgage out of the personal estate of a deceased person situated here, will not accomplish such object here. The judgment has no extra territorial force, and only applies to personal property situated in South Carolina.

RICE *v.* HARBESON..... 4

2 — *Lex rei sitæ.*] A nation within whose territory personal property is situated has as entire dominion over it, while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. *Ib.*

CONFLICT OF LAW—*Continued.*

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3. ———, *action for same subject-matter before different tribunals.*] While it is a settled principle, that where two tribunals have concurrent jurisdiction, the one which first obtains jurisdiction of the parties and of the subject-matter has the right to determine the controversy, the courts of this State will not stay a defendant, who is a non-resident, from prosecuting his action in the forum of his own residence.  
BARRY v. MUT. LIFE INS. CO. .... 15
4. ———, *Divorce—Judgment obtained in another state against a non-resident.*] Plaintiff and T., her husband, lived in Massachusetts. She left him and went to Vermont, where she obtained a divorce upon the ground of his abandonment of her. In that action, personal service of some of the papers was admitted by T., who waived all objections to the service, and the judgment was obtained by default. Plaintiff then married defendant in this State. In an action against defendant for divorce, defendant set up that plaintiff was still the wife of T. *Held*, that the cause of action against T. not having arisen in Vermont, or while the parties resided there, and the service on T. not being in that State, its courts had no jurisdiction to annul the marriage between plaintiff and T., and the decree to that effect was therefore a nullity.  
MOE v. MOE. .... 647

*See* BANKRUPTCY; INJUNCTION, 1.

CONSIDERATION: *See* CONTRACT, 2; FRAUDULENT CONVEYANCE, 1.

- CONSIGNOR AND CONSIGNEE—*Bill of lading—Factors' act (Laws 1830, chap. 179).*] A quantity of wheat was shipped by pro-  
peller from Milwaukee to Buffalo, consigned to W., and a draft made upon W. for the purchase price. To meet this draft, W. procured credit from the plaintiff, the M. bank, and assigned as security the bill of lading of the wheat. The draft was paid by plaintiff. Before the arrival of the wheat at Buffalo, W. agreed to sell it to N. Upon its arrival, W. took charge of it and placed it in an elevator connected with the Erie Railway. On the same day, W. gave N. an order for the wheat, N. promising to pay for it the next day. N. took possession of the wheat, shipped it by the Erie Railway to New York, consigned to a firm there, and took a bill of lading, in which it was stated that the wheat was subject to the order of defendant, the F. bank. Upon the delivery of this bill, defendant, in good faith, discounted a draft by N. upon the consignees in New York. In an action against defendant for the conversion of the wheat, *held*, that the provisions of the factors' act (Laws 1830, chap. 179) did not apply to or include defendant, who was not a consignee or factor of N. Said act only applies to consignees named as such in the bill of lading.  
MANUF. AND TRAD. BANK OF BUFFALO v. FARM. AND MECH. NAT. BANK OF BUFFALO. .... 895

2. ———, *Apparent owner—when acts of, bind true owner.*] *Held*, also, that W., being the general owner of the wheat, his acts bound the plaintiff as to those dealing with him in good faith and without notice. W. having clothed N. with the apparent ownership of such wheat, and thereby enabled him to obtain credit from defendant, plaintiff could not recover for the conversion of the same. *Ib.*

CONSTITUTION:

Art. 1, § 2, 553; Art. 1, § 6, 148; Art. 6, § 13, 459; Art. 14, § 8, 541.

CONSTITUTIONAL LAW—*State constitution, art. 6, § 18—justices of peace not limited as to age.*] Justices of the peace are not within the provision of the constitution (art. 6, § 13) limiting the tenure of judicial office to seventy years of age. Accordingly, where a justice of the peace who had been chosen after reaching seventy years sat as a jus-

CONSTITUTIONAL LAW — *Continued.*

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tice of sessions at a criminal trial, *held*, that the conviction of the prisoner could not, for that reason, be avoided.

DOHRING v. PEOPLE..... 458

2. ———, *Justice de facto* — *acts of, when valid.*] *Held*, also, that even if the justice was not such *de jure*, he was *de facto*, and the conviction was valid. *Ib.*

*See* APPRENTICESHIP; RAILROAD AID BONDS.

CONSTRUCTION OF CONTRACT: *See* CONTRACT, 1, 5, 15.

CONSTRUCTION OF STATUTES: *See* STATUTES CONSTRUED, &c.; STATUTORY CONSTRUCTION.

CONSTRUCTION OF WILLS: *See* WILL, 3, 5, 6, 7, 8, 9, 11; SURVIVORSHIP, 1.

CONTRACT — *construction of.*] B brought a creditors' suit to discover money or property of P. Defendant, against whom an action had been brought by the committee of P., to set aside the conveyance of certain property previously owned by P., in settlement of such action agreed that if B should discover in his creditors' suit any money or property of P., and should recover final judgment, that such money or property be applied in satisfaction of a judgment held by B, defendant would satisfy such judgment "to the extent of the money or property so adjudged to be applicable to the payment" of said judgment. Property was discovered of the value of \$11,894. Out of this the court deducted for costs and administrators' fees and commission, \$3,119.96, leaving a balance of \$8,574.42, which last-named sum it found and adjudged was applicable in reduction of the judgment of B. In an action upon the agreement of defendant, *held*, that defendant was liable for only the said sum of \$8,574.42, and was not liable for the whole sum discovered.

NICHOLS v. TIFFT..... 814

2. ———, *For sale of real estate — stipulations as to cutting timber — application of moneys received by vendor.*] Plaintiff and C. made a contract, whereby C. agreed to convey to plaintiff a farm at a specified price. Plaintiff, on his part, agreed to pay such price, and also to cut and deliver to C., all the spruce timber on the farm at a certain price; he also agreed to cut and deliver hemlock logs and peel hemlock bark for G. at certain rates. A portion of the moneys due for such timber and bark was to be applied toward the payment of the purchase-money of the farm, the remainder, to be received by plaintiff, in cash. The contract further provided, that until the deed of the farm was delivered, C. should remain in possession, and plaintiff should not cut or sell, except as above stated, any timber standing on the premises. A firm of bridge builders, wishing some timber, applied to plaintiff to sell them some. Plaintiff asked C. to consent to his doing so; C. refused, unless a certain proportion of the price was paid to him, and an agreement of sale was made, whereby C. was to receive a share. Under this agreement, C. received from the firm of bridge builders \$431.68. *Held*, that in the absence of an express agreement that C. might take the money received by him to his own use, it would be applicable on the contract for the sale of the farm toward the purchase price. The consent, however, of C. would furnish a sufficient consideration for an agreement that he might receive such money to his own benefit.

PARSONS v. COBURN..... 824

3. ———, *Non-performance of.*] In an action to foreclose a mechanic's lien, it appeared that the plaintiff refused to perform certain portions of the work agreed to be done by him under contract with defendant,



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## CONTRACT—Continued.

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although requested by the defendant to perform it. *Held*, that the plaintiff was not entitled to recover for the work done.

McNEAL v. CLEMENT..... 363

4. ———, *Waiver*.] *Held*, also, that the fact that defendant lived in the building upon which the work was done, during its performance, and in some things directed the manner of its execution, did not constitute a waiver of the fulfillment of the contract. *Ib*.

5. ———, *Construction of—sale*.] Plaintiff delivered to H. some sheep under this agreement: "July 8, 1869. I have taken of A. E. R. twenty-nine sheep and twelve lambs, to be returned on the 1st of September, 1871, \* \* \* said sheep to be returned as good and in as good condition and age as when taken." *Held*, a sale and not a bailment of the sheep.

REED v. ABBEY..... 380

6. ———, *For sale of materials—deficiency in quantity*.] Plaintiffs agreed to deliver to defendant a specified quantity of stone at a stipulated price. The stone was delivered and partly paid for, but, when defendant came to use it, it was found deficient in quantity. *Held*, that the charge of the judge at circuit, that plaintiffs were entitled to recover for material actually furnished, was not erroneous as against the defendant.

NORMINGTON v. COOK..... 423

7. ———, *Sale of real estate—release from performance*.] Defendant contracted to purchase certain real estate of S. and to pay a specified part of the purchase price on October 1st, at which time S. was to give a deed. By mutual agreement the time of performance was extended. At the second date agreed upon, defendant started for the place where the contract was to be performed ready to fulfill his part, but was turned back by a message from S. that the deed was not ready, and defendant need not come. *Held*, that defendant was released from all obligation to perform the contract.

MUT. LIFE INS. CO. OF NEW YORK v. LEONARD..... 425

8. ———, *Condition precedent*.] A contract for paving a street in the city of New York provided that the contractor should not be entitled to demand or receive payment for work or materials until the work should be fully completed in the manner agreed, and such completion certified by the inspectors employed thereon, and by the water purveyor, or other officer designated by the commissioner of public works; wherefore, the city agreed to pay to the contractor, on the confirmation of the assessment, the sum specified in such agreement. A certificate of the completion of the work was given by the inspector, but none had been given by the water purveyor, nor by any other officer designated by the commissioner of public works. Such commissioner, however, had certified that the work had been returned as properly completed, and had been accepted. *Held*, that it was competent for the parties to make these provisions for determining whether or not the contract had been performed, and they having done so, in express terms, the obtaining of both certificates, viz., of the inspector and the water purveyor, became a condition precedent to any right of recovery by the contractor.

BOWERY NAT. BANK v. MAYOR OF NEW YORK..... 523

9. ———, *Held*, also, that the decision of the question of completion having been referred, by the contract, to the inspector and purveyor, it could not afterward be withdrawn and referred to the decision of a court or jury, without showing impossibility of performance, or that the certificate had been unreasonably and in bad faith refused. *Ib*.

CONTRACT — *Continued.*

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10. ———, *Certificate of performance.*] *Held*, further, that the certificate of the commissioner of public works himself, that the work had been performed and accepted, was not a sufficient compliance with the terms of the contract. *Ib.*
11. ———. By the terms of the contract, the money was not payable until the assessment levied should be confirmed. That had not been done, because confirmation had been prevented by injunction. *Held*, that it was no answer to the objection that the money was not yet due for the plaintiff to show the pendency of the injunction. *Ib.*
12. ———, *For services—tender of performance.*] Plaintiff was employed by defendant for a specified time. After the term of his service had commenced he was prevented by defendant from entering upon his duties, and was finally discharged. *Held*, that plaintiff was not obliged to tender a performance of his services as a condition precedent to maintaining an action for their value.  
 PETIT v. TURNER..... 608
18. ———, *To purchase real estate—false representations by vendee.*] Plaintiff, who owned two stores, represented to defendant, who desired to invest in real estate which would yield an immediate income, that one of the stores rented for \$900 a year and upwards, and that the other was already rented and the tenants ready to come in. Relying upon these statements, defendant agreed to purchase the stores. At the time a part of one of the stores was rented for \$600 a year, but no other part of either building was rented. In an action for damages resulting from defendant's refusal to complete the agreement to purchase, *held*, that the representations were material, and being untrue, defendant was not bound to carry out his contract.  
 PHILLIPS v. CONKLIN..... 619
14. ———, *Parol agreement to exchange lands. Statute of frauds.*] Plaintiff and defendants by parol agreed to exchange lands. Plaintiff conveyed his premises to defendants, who took possession, but refused to convey to plaintiff the lands owned by them. *Held*, that having performed his part of the agreement plaintiff was entitled to recover of the defendants the value of the particular consideration therefor withheld by them, and had a remedy in equity against them which was not defeated by the statute of frauds.  
 BAKER v. SCOTT..... 606
15. ———, *power of steam engine.*] Defendants agreed to furnish a steam engine which would run certain machinery in a mill. *Held*, that if the engine was a fair and merchantable one, and did the work agreed to be done, it was sufficient; and such engine need not stand the test of an indicator placed upon it for the purpose of showing its power.  
 WAVERLY PAPER MILLS v. BRISTOL..... 603
- See* ATTORNEY AND CLIENT; DAMAGES; EVIDENCE, 20, 23, 25; MARRIED WOMEN, 1; PARTNERSHIP, 1, 2, 8, 4, 7, 13; RELEASE; SALE; VENDOR AND PURCHASER.
- CONTRIBUTORY NEGLIGENCE: *See* NEGLIGENCE, 2.
- CONVERSION — *what is not.*] The holder of a promissory note, claimed to have been made by a deceased person, but which was disputed by the representatives of the alleged maker, placed it in the hands of M., to be negotiated for such amount as he could get from those interested in the estate. A daughter of the alleged maker paid M. a small part of its face value and received the note, which she handed over to the executors of her father's estate. *Held*, that such daughter did not wrongfully convert the note.  
 HAYES v. ADAMS..... 593
- See* ASSIGNMENT, 2; WRONGFUL CONVERSION.

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CONVEYANCE: *See* CORPORATION, 1.

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CORPORATION — *Seal—religious society, conveyance by.*] In a deed of real property belonging to a church, the grant was by the church by its trustees, and the deed stated that the trustees in their official capacity, "have hereunto set our hands and seals, hereby certifying that said church has no corporate seal." It was signed by the trustees as such, and a seal affixed to each name. *Held*, that the church having no formal seal, might adopt one, and that annexed to the name of each trustee was the corporate seal of the church. Adding several impressions of the seal would not avoid it.

CHRISTIE v. GAGE..... 344

2. —, *Railroad companies—when directors entitled to compensation.*] A director of a railroad company is not entitled to compensation for his legitimate and ordinary duties as director, but is, for his personal services, beyond the ordinary range of his official duties upon an actual employment by the company.

JACKSON v. NEW YORK CENTRAL RAILROAD COMPANY..... 653

3. —. ] Plaintiff's testator, while a director of a railroad company, acted as legal counsel in a certain action, to which the company was a party. *Held*, that the testator was entitled to compensation when so employed by the company, and that it was not indispensable that his employment should be by a formal resolution of the board of directors, but it might be inferred from the nature of the employment, the importance of the subject-matter, the partial payment of his claim, and other acts of the board recognizing an indebtedness. *Ib.*

4. —, *Interest.*] Testator's claim for services was presented to the board of directors of the company, and by them referred to a committee. *Held*, that interest on the claim was allowable from that time, and this, notwithstanding no formal account of the debt was made out. *Ib.*

*See* INSURANCE DEPARTMENT; RAILROAD AID BONDS, 3.

COSTS — *on appeal—mutual mistake.*] By a mutual mistake of the parties and referee, as to the date, one of the demands of the appellant, which he was entitled to, was not allowed. As soon as it was discovered, respondent offered to deduct from the judgment in his favor the amount of the demand. *Held*, that the respondent should not be charged with costs of appeal by reason of the mistake.

PERRINE v. HOTCHKISS..... 370

2. —, *Additional allowance.*] Where a party, by the final judgment, does not recover general costs, but costs of the appeals only, he is not entitled to an additional allowance.

SAVAGE v. ALLEN..... 474

3. —, *On trial in county court of justice's court action.*] In an action in a justice's court, plaintiff claimed \$50, and defendant set up a counter-claim for a like amount. The justice rendered a judgment in favor of defendant for his counter-claim, from which plaintiff appealed. Upon a new trial in the county court, the jury rendered a verdict of no cause of action on the part of plaintiff, but did not find in favor of defendant's counter-claim. *Held*, that defendant was bound to make no offer and was entitled to costs in the county court.

CHURCH v. MILLER..... 533

4. —, *On appeal—between defendants in partition suit.*] In an action for partition, one of the defendants appealed from an order therein to the general term, where the order was affirmed, and to the court of appeals, where the appeal was dismissed. One of the other defendants was an infant, who appeared by a guardian and put in a general answer. The infant's interests were identical with those of

**Costs — Continued.**

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the plaintiff, and the guardian was represented during the whole litigation by the same counsel as the plaintiff. *Held*, that the guardian was not entitled to costs as against the appealing defendant, upon the appeal to the court of appeals, in the absence of an explicit direction of that court granting him costs.

HALSTEAD v. HALSTEAD ..... 673

*See* ACTION, 4.

**COUNTER-CLAIM — accord and satisfaction.**] In an action upon a bond, the defendant set up, as a counter-claim, an account for professional services rendered the obligee. The plaintiff, in answer to the counter-claim, alleged that the bond was delivered as a full settlement, on a final accounting between the parties. The referee having found that the counter-claim accrued before the accounting took place, *held*, that it was barred by such settlement and the giving of the bond.

MOUNT v. ELLINGWOOD ..... 527

*See* SUMMARY PROCEEDINGS.

**COUNTIES — charges against — stationery furnished to sheriff.**] The relator supplied to the sheriff of New York county, note, foolscap and letter paper, envelopes and writing and blotting materials. *Held*, that the articles could not be allowed as a charge against the county. There is no statute authorizing the furnishing of such things, and they do not come within the rule that, wherever services have been rendered which are beneficial to a county, and no specific compensation is provided for the same by law, they shall be deemed contingent charges against the county.

PEOPLE *ex rel.* BROWN, appellant, v. GREEN (No. 2), ..... 23

2. —, *Void audit.*] *Held*, also, that the charges, not being good against the county, an audit and allowance of them, by the board of supervisors, would be void. *Ib.*

**COUNTY CLERK:** *See* RAILROAD AID BONDS, 1.

**COVENANT:** *See* LANDLORD AND TENANT, 2; LEASE, 1.

**COVERTURE:** *See* MARRIED WOMEN, 2.

**CRIMINAL LAW — Trial — persons jointly indicted.**] Where four were jointly indicted for felony, *held*, that three of those indicted had no right to require that the fourth should be tried jointly with them.

ARMSBY v. PEOPLE ..... 157

2. —, *Qualifications of juror.*] Upon a challenge to a juror for principal cause, it appeared that he had owned a farm; had conveyed it away "last spring," and did not then own any real estate. He had taken back a mortgage, but could not tell, of his own knowledge, that he was assessed "this year" for any personal property. He had not been so assessed the preceding year, but had then been assessed for real estate. The trial took place in June. The court sustained the challenge. *Held*, no error. *Ib.*

8. —, *Evidence.*] Upon an issue as to the identity of the defendants with persons who had committed a larceny, it appeared, that while two of such defendants were under arrest, the complainant said that one of them was the man "who had scooped in his money," and the other was the man who had introduced a game of dice (during which the larceny was committed), and they made no reply. He then said, that another had represented himself as city attorney, and then both of the prisoners spoke up and said he was mistaken, and that that man was a stranger, who had just dropped in. Money had already been found on one of the prisoners, which corresponded somewhat with the money which had been taken from the complainant. This evidence

CRIMINAL LAW — *Continued.*

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was admitted by the court as against the two defendants, in whose presence it occurred. *Held*, that the evidence was admissible. *Ib.*

*See* EMBEZZLEMENT; EVIDENCE, 3, 4, 12, 13, 14; MANSLAUGHTER; JURISDICTION; SEDUCTION; TRIAL, 2.

CUSTOM. It was claimed by the plaintiffs that it was customary when a vessel was sold through the intervention of a broker, for the seller to pay a commission. *Held*, that if the defendants were ignorant of this custom they would not be bound by it.

SMITH v. TYLER..... 669

DAMAGES — *on breach of contract of sale.*] Plaintiff sold, and partly delivered some damaged paper to defendant. Defendant refused to receive the balance, whereupon, plaintiff, after notice to defendant, sold the same at public auction. *Held*, that this method of ascertaining the damage was legal.

FISHER v. LIBBY..... 673

*See* EVIDENCE, 8, 16, 17, 21, 24; PROMISSORY NOTES, 8; REAL PROPERTY, 1, 2.

DECLARATIONS: *See* EVIDENCE, 1, 3, 4, 5; INSURANCE, 12.

DEED — *Misdescription of lands — when reconveyance will be directed.*] Defendant, by verbal contract, agreed to sell and convey to plaintiff certain lands. A deed was made under defendant's direction containing a description, not of the lands agreed to be sold, but of other lands. This deed was accepted by plaintiff under the belief that it covered the lands agreed for. *Held*, that the plaintiff was entitled to the equitable relief, that a reconveyance containing a correct description be executed by defendant.

WILSON v. VAN PELT..... 414

2. —, *Evidence.*] Evidence in respect to the comparative value of different parts of the parcels of land in controversy *held* admissible, on the question of defendant's fraud. *Ib.*

*See* ACKNOWLEDGMENT; FRAUDULENT CONVEYANCE, 1, 8; MARRIED WOMEN, 2; MISTAKE OF FACT; VOLUNTARY DEED.

DEFAULT: *See* PRACTICE, 8.

DEFENSE — *settlement — agreement to settle.*] Plaintiff brought action against defendant for work, etc. The cause was referred. Upon the day noticed for trial, the parties agreed upon a settlement. Both informed the referee of that fact, and he left the place where the trial was to be had. Before the necessary papers were drawn, plaintiff refused to adhere to the settlement, although defendant tendered performance on his part. The referee was sent for, and he came and began the trial. Defendant objected to the proceedings on the ground of the settlement, evidence of which was offered and rejected. The trial was commenced and adjourned. Before the next hearing, defendant, by leave of court, at special term, put in a supplemental answer, setting up the settlement. The trial proceeded to a conclusion. The referee found that there was no settlement, and gave judgment for the amount of plaintiff's claim. *Held*, that the agreement made between plaintiff and defendant, and the defendant's tender of performance, constituted a good cause of action in equity, for specific performance, and defendant was entitled, under the Code, to set it up as a defense in this action.

KELLY v. DEE..... 286

*See* ACTION, 6; ANSWER; DEMURRER, 1; INSURANCE; PLEADING, 1, 3, 5, 6, 7, 8.

DELIVERY: *See* COMMON CARRIER, 1; SALE, 4.

DEMAND: *See* ACTION, 1.

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DEMURRER — *insufficient defense.*] Plaintiff brought action for breach of a city ordinance and set forth that defendant, in violation of such ordinance, did "cast and deposit in O. river, which forms one of the harbors in said city, and in a raceway leading from defendants' mill into said river, the same being one of the water channels of said city, saw dust, etc., which had the effect to fill up and obstruct the water channels and harbors of said city, etc. Defendants set up in answer, among other things, that the raceway is not a part of the O. river, nor a public highway, nor the property of the city, but an artificial channel belonging to defendants and used by them for upward of twenty years to float sawdust, etc. *Held*, that this did not meet the charge that defendants cast and deposited saw dust, etc., in the O. river, which filled up and obstructed the water channels, etc., and was an insufficient defense, and bad on demurrer. Defendants had no right to so use their raceway as to fill up and obstruct the water channels of the city, and the legislature had a right to make provision to prevent the abuse of defendants' right of using their raceway by prescribing the mode and manner of using it.

CITY OF OGDENSBURG v. LOVEJOY ..... 83

2. ———, *Adverse user — nuisance.*] *Held*, also, that filling up the channels and harbors was a public nuisance which no length of time would legalize. *Ib.*

*See* ANSWER; FRAUDULENT CONVEYANCE, 5; ESTOPPEL, 2; PRACTICE; TITLE.

DEPOSIT: *See* TITLE.

DEVISE — *to church — conveyance by church.*] A testator devised real estate to the trustees of a church, to hold or sell at their option, the avails, after payment of a specified amount to his heirs, to be invested, and the income applied to the uses of the church. *Held*, that the devise was valid and vested in the church, and not in the trustees, and it was necessary to obtain the consent of the court to sell the same.

CHRISTIE v. GAGE ..... 344

2. ———, *Notice of application for leave to sell church property.*] Real estate was devised to a church subject to a provision that certain designated persons should share in the avails. *Held*, that such persons were not entitled to notice of proceedings, on behalf of the church, to obtain leave to sell the devised estate. *Ib.*

DIRECTORS: *See* CORPORATION, 3.DISCONTINUANCE: *See* EMINENT DOMAIN.DISCRETION OF COURT: *See* EXCISE LAW, 3; INTEREST, 2; MORTGAGE, 6.DISORDERLY CONDUCT: *See* JURISDICTION.

DIVORCE — *what relief allowable in actions for.*] Plaintiff, whose wife was living, married C. J. Afterward he commenced an action for a divorce from C. J., upon the ground that his marriage with her was void, and no defense being put in a judgment dissolving the marriage was entered. He then married C. B. Afterward C. J. applied for leave to defend the action for divorce, which she was allowed to do. C. B. was also allowed to intervene and plead. *Held*, that the only question which could be passed upon in the action was the validity of the second marriage. The validity of the third could not be inquired into, no relief as against that having been asked in the complaint.

ANONYMOUS ..... 558

*See* CONFLICT OF LAW, 4; PLEADING, 2, 5, 6, 7, 8.

DOWER: *See* PARTITION; TRIAL, 1.

EJECTMENT: *See* ACTION, 6.

ELECTION LAW: *See* EVIDENCE, 14.

EMBEZZLEMENT — *indictment for.*] An indictment charged defendant with embezzling a specified sum and converting the same to his own use. Evidence was given showing that defendant had received for premiums due an insurance company for which he procured applications, various sums, at various times from different individuals, a part of which he had paid over, and that the sum charged in the indictment was the balance due from him. The embezzlement of any particular sum or specified money was not shown. *Held*, that the charge was not sustained.

PEOPLE v. HOWE..... 888

2. ———, *What does not constitute.*] Defendant procured a number of applications, giving credit and taking notes for a portion of the premiums. The company, knowing this, issued the policies applied for and charged the premiums due to the account of defendant. Defendant collected from the policy-holders small sums at various times, until he had obtained the whole amount of the premiums. A part of this he had sent in various sums to the company, which sums had been received from him on account. *Held*, that the failure to pay the balance did not constitute embezzlement. *Ib.*

EMINENT DOMAIN — *commission to acquire title — right to discontinue.*] The board of commissioners of Washington park, in Albany, were authorized to acquire title to lands under the provisions of the general railroad law. In pursuance of their authority they took proceedings to condemn certain lands to the use of the park, and commissioners of appraisal were appointed who made awards of compensation to the land owners. *Held*, that, until the awards were confirmed, the party seeking to acquire lands might discontinue further proceedings and abandon the attempt to acquire title, and that the board of commissioners of Washington park could alone ask for confirmation.

WASHINGTON PARK v. BARNES..... 687

EMPLOYEE — *when legal counsel is not.*] An order of court for payment, out of moneys in the hands of the receiver of a railway company, of debts owing to "the laborers and employees" of the company "for labor and services actually done in connection with that company's railways." *Held*, that the order designed to limit the operation of the word "employee" to such servants of the company as were usually engaged in the construction, operation and maintenance of the company's railways, and did not include one employed as occasional legal counsel of the company.

GURNEY v. A. & G. W. RAILWAY CO..... 446

ENDORSEMENT: *See* PROMISSORY NOTES, 3, 4, 5.

ENLISTMENT: *See* TOWNS.

EQUITY: *See* DEED, 1; PARTNERSHIP, 3, 4, 7, 10.

EQUITABLE ACTION: *See* ATTORNEY AND CLIENT; CONTRACT, 14; DIVORCE; FRAUDULENT CONVEYANCE, 7; LANDLORD AND TENANT, 3.

ESTOPPEL — *Mortgagor and assignee of mortgages.*] P. executed a bond and a mortgage upon his lands to J. Afterward J. duly assigned the bond and mortgage to A. P. being indebted to plaintiff, in consideration of an extension of time of payment and a loan of money in addition, procured an assignment from A. to plaintiff of so much of the mortgage as was equal to the debt and loan. Payment of such debt and loan not being made when due, plaintiff was about to foreclose, when P. claimed that the bond given with the mortgage had not been assigned to plaintiff. An arrangement was made for another extension of time, in consideration of which P. procured an assignment from

ESTOPPEL — *Continued.*

PAGE.

A. to plaintiff of such part of the bond and mortgage as was equal to the amount which the first assignment covered, and of a judgment against P. held by plaintiff. In an action by plaintiff to foreclose the mortgage, *held*, that P. was estopped from claiming that the mortgage was only given to secure a contingent liability which had ceased when the same was assigned to A., and from setting up any defect in the title of A.

CARPENTER v. O'DOUGHERTY..... 427

2. ———, *Pleading — defect in parties.*] A. was made a party defendant in the action. No reason was given for not making her a party plaintiff. *Held*, that the objection thereto could be taken only by demurrer. *Ib.*

*See* ADMINISTRATOR; RAILROAD AID BONDS, 5; SURVIVORSHIP, 3.

EVIDENCE — *husband and wife — wife's separate estate — agency — declarations of agent.*] A husband obtained a loan upon notes made by his wife, and indorsed by him. *Held*, that declarations made by the husband at the time he applied for the loan, that he was conducting the business for his wife, and at the time the loan was made, that he was her agent, were inadmissible to establish the fact of his agency, or that the loan was being made for the benefit of the wife's separate estate.

SECOND NATIONAL BANK OF WATKINS v. MILLER..... 104

2. ———.] The fact that defendant was insolvent; that she had secured other notes of his by bond and mortgage; that he had charge of her separate estate, and that she allowed him to draw funds and manage the same, making improvements upon the estate, did not tend to establish that he was her agent to bind her separate property in this transaction. *Ib.*
3. ———, *Death from abortion — declarations of deceased, when admissible.*] To constitute an offense under the first section of the Abortion act of 1872 (Laws 1872, chap. 181, § 1), the death of the mother or child is essential, and the dying declarations of a person upon whom an abortion has been produced, concerning the circumstances of the act, are therefore admissible against one charged with the offense.

DAVIS v. PEOPLE..... 212

4. ———.] But declarations made after the act, when the person making them is not in a dying condition, are not admissible. *Ib.*
5. ———, *Accident insurance — death while fighting — declarations of deceased.*] A policy of insurance against accident, etc., was conditioned that no claim should be made under it if the death or injury should be "caused by dueling, fighting," etc. ("except in cases of perilous necessity"), or should happen "by unnecessary exposure to danger or peril," "or when engaged in any unlawful act." The insured was killed in a fight about the possession of certain premises, the title to which was in dispute between him and another. In an action upon the policy, *held*, that threats made previous to the fight by the insured against the person disputing his title, were admissible upon the questions as to whether the death of insured happened by an unnecessary exposure to danger or occurred while he was engaged in an unlawful act.

YALE v. TRAVELERS' INS. CO..... 221

6. ———, *Account.*] In an action for money loaned, the fact of the loan was denied, and defendant examined witnesses to show that both plaintiff and defendant belonged to the same regiment; that the money in question was used in raising the regiment, and that plain-



EVIDENCE — Continued.

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- tiff had presented an account for the same sum to the council of officers, and it had been allowed. It appearing that the account was in writing, plaintiff objected on the ground that the account itself should be produced, but the referee allowed the evidence. *Held*, no error.
- PATTON v. DODGE..... 239
7. ———, *Reading to witness evidence already given.*] Upon an examination in chief a question put to a witness was objected to, whereupon, and before the question was answered, the counsel conducting the examination proposed to read to the witness his evidence already given on the same subject, but the referee refused to allow it to be done. *Held*, no error. *Ib*.
8. ———, *Damages, how proved.*] In an action to recover damages for injuries to a farm, the judge at the trial permitted a witness to answer the question, "What was the damage—the annual damage—in the rent of the farm, in your judgment?" *Held*, error.
- HUDSON v. CARYL..... 245
9. ———, *Dissolution of partnership, notice of.*] The mailing of a notice of the dissolution of a partnership, properly directed to a dealer with the firm, is only *prima facie* evidence that the notice was received, and may be rebutted by proof that the person to whom it was directed was not at the place to which it was sent, and that he did not in fact receive it.
- AUSTIN v. HOLLAND..... 253
10. ———, *Slander—repetition of slanderous words.*] In an action for slander, evidence was given of the repetition by defendant, on different occasions, of the words laid in the complaint. *Held*, admissible for the purpose of showing malice. The fact that the repetition took place after the action was brought would not exclude evidence of it.
- FRAZIER v. MCCLOSKEY..... 266
11. ———, *Former adjudication—waste.*] In an action by the owner of the fee of a farm, against the lessee of the tenant for life for waste, a judgment in a former action for waste upon the same premises, between the same parties, but not for the acts alleged in the action at bar, was offered in evidence. The question at issue was whether the acts complained of in the action at bar were waste. *Held*, that the judgment was inadmissible.
- RUTHERFORD v. AIKEN..... 281
12. ———, *seduction—hypothetical question.*] On a trial for seduction under promise to marry, on direct examination, the prosecutrix having been questioned as to whether she was induced to have the connection by the promise of marriage, was further asked: "And would you have consented to it in the absence of a promise?" *Held*, that the question called for a merely speculative answer on the part of the prosecutrix, and was inadmissible.
- COOK v. PEOPLE..... 404
13. ———, *Refusal to marry.*] Evidence on the part of the people that the prisoner, subsequent to the seduction, had refused to marry the prosecutrix, *held*, inadmissible. *Ib*.
14. ———, *Election law—offenses against.*] On the trial of an indictment, under the statute making it a felony "for any person other than an inspector of elections to knowingly and willfully put, or cause to be put, ballots into a ballot-box" at certain elections, it was admitted that the prisoner was not an inspector, and that he did put ballots into a ballot-box at an election. *Held*, that evidence to show that the prisoner was, at the time, acting as inspector instead of C., who

EVIDENCE — *Continued.*

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had been appointed, and who had, by power of attorney, appointed the prisoner to act in his place, was properly rejected.

HOGAN v. PEOPLE ..... 535

15. ———, ———.] In an action against a railroad company to recover the value of a steer killed by an engine, this question was asked, "Where was the steer when the train struck him, as indicated by the marks on the ground and track?" *Held*, proper, and calling for a fact and not an opinion.

FANNING v. LONG ISLAND R. R. Co. .... 535

16. ———, *Experts — value of legal services.*] Hypothetical questions founded upon facts, assumed to have been established, were asked by plaintiff's counsel of lawyers to prove, by their opinion, the value of testator's services in an action to recover for legal services. *Held*, that the allowance of such questions was not error.

JACKSON v. NEW YORK CENTRAL RAILROAD Co. .... 653

17. ———, Evidence of an experienced lawyer, and one well acquainted with testator, as to the considerations which gave value to the testator's services, *held* admissible. *Ib.*

18. ———, *Improper joinder of causes of action.*] Although a complaint may contain causes of action not properly united, or the complaint is not in accordance with the summons and no objection is made by motion, but an answer is put in, defendant cannot object at the trial to the introduction of evidence, under either claim in the complaint.

LEACH v. LEACH ..... 657

19. ———, *Impeaching witness.*] Evidence to show that a witness interposed to prevent a settlement between plaintiff and defendant of the matters in issue *held* not admissible to impeach or discredit such witness. While a witness may be cross-examined to show that he has a feeling hostile to the opposing party, such feeling cannot be proved independently. *Ib.*

20. ———, *Contract.*] A contract between an advertiser and an advertising agent, in respect to the insertion of advertisements in various newspapers, contained the following: "And it is distinctly understood and agreed upon by the signer hereof, that the schedule papers must have been in existence as newspapers twelve months, and that no advertisements must be inserted in them of Holloway's preparations, if his advertisement is already therein when offered by said Stephens, or wanting these two essential points, this contract will be null and void." In an action wherein the advertising agent in his answer claimed damages, by reason of the refusal of the advertiser to carry out the contract; *held*, that it was necessary for the advertising agent to show that the papers, in which he had been prevented from advertising by plaintiff's repudiation, were such as had been in existence "as newspapers" for twelve months, and that "Holloway's preparations" were not already advertised in them.

HOLLOWAY v. STEPHENS ..... 658

21. ———, *Measure of damages.*] The finding of the referee was that the advertising agent was entitled to \$135,355.44 damages, declared to be the estimated profits the agent would have received, at the end of two years, if the contract had been fully carried out. The estimate was made upon a total of 217 newspapers, and the gross aggregate of charges, after making certain deductions, was estimated to be \$270,710.88, of which the agent was allowed 50 per cent. There was no proof of the existence of the newspapers; that they had been in existence the time required by the contract; that the advertiser's advertisements were not already in them; that they were ready and willing to insert advertisements as low as the estimated cost of pub-

EVIDENCE — *Continued.*

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lishing, or that they were permanent, and would have been able to have continued the advertisements for the time stipulated. *Held*, that the measure of damages was altogether too speculative and conjectural, and that the judgment entered upon the report of the referee should be reversed. *Ib.*

22. ———, *Admissions.*] A witness for plaintiff, who had testified to an admission by defendant, was asked upon cross-examination: "How much did defendant say he owed plaintiff at that time and in that conversation?" *Held*, that the question was proper, and not in conflict with the rule in *Rouse v. Whited*, 25 N. Y. 176.

MISSELBECK v. GREIME ..... 660

23. ———, *Statute of frauds — when objection to void contract must be taken — warranty.*] In an action to recover the price of a quantity of roofing material the defense was a breach of warranty. *Held*, that the objection that the warranty being for five years was void, unless in writing, could not be raised for the first time upon appeal to general term. It should have been made at the trial.

JOHNS v. GUSTIN ..... 662

24. ———, *Damages.*] A witness was asked what a roof would have been worth, if it had been as stated by defendant, and in circular. It did not appear that the circular was issued by plaintiff. *Held*, that the question was improper. *Ib.*

25. ———, *Violation of contract.*] In an action upon a note, given in payment of plaintiff's services as salesman, in 1871, the defense was, that plaintiff had violated his duty while in defendant's employ by selling goods for another establishment in the same business. *Held*, that evidence that the amount of work done in a particular branch of defendant's business in 1871, was less than that done in either 1869 or 1870, the decrease not being shown to be attributable to plaintiff's acts, was inadmissible.

HOWES v. HALL ..... 665

26. ———, *Charge to jury.*] Certain agricultural machines, not kept by defendant, were frequently asked for by defendant's customers. It was shown that plaintiff had told those inquiring that defendant did not keep the machines, but they could be procured at another establishment. *Held*, that the charge of the court at trial that "if the defendant did not manufacture these machines the plaintiff had the right to turn over the orders to other establishments," was not erroneous, taken in connection with the evidence, and the assumption that plaintiff acted in good faith. *Ib.*

*See* ANIMALS, 8; APPEAL, 1; COMMISSION; CRIMINAL LAW, 3; DEED, 2; FRAUDULENT CONVEYANCE, 8; INSURANCE, 2, 11, 12, 18; MARRIED WOMAN, 2; MISTAKE OF FACT; NUISANCE, 8; PARTNERSHIP, 11; SEDUCTION, 2; SURVIVORSHIP, 8; USURY; WASTE, 2; WILL, 1, 4, 10, 12.

EXCAVATIONS: *See* REAL PROPERTY.

EXCEPTIONS: *See* PRACTICE, 8, 4.

EXCISE LAW — *Selling without license.*] Upon a conviction under an indictment for selling intoxicating liquor without license, in violation of Laws 1857, chap. 628, § 13, the judgment must be for the amount of fine and the time of imprisonment prescribed by § 29 of the same act, and the court has no discretion.

FOOTE v. PEOPLE ..... 210

2. ———, *Penalty.*] The penalty provided by § 13 for selling without license is merely that recoverable in a civil suit, and the party violat-

EXCISE LAW—*Continued.*

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ing that section is also amenable to the criminal penalties for offenses in violation of the act provided in § 29. *Ib.*

8. ———, *Discretion of court.*] Upon a conviction for the violation of the provisions of the excise law, in selling intoxicating liquors without license (Laws 1857, chap. 628, § 13), the court has no discretion in regard to the punishment, but must impose that provided by § 29 of the law.

MORRIS v. PEOPLE ..... 219

ESCAPE: *See* SHERIFF.

EXAMINATION: *See* WITNESS.

EXECUTION: *See* ACTION, 2.

EXECUTOR—*Debt of to estate—when judgment debt not discharged.*] A judgment debtor was appointed executor by the will of his judgment creditor. *Held*, that neither the debt nor the judgment was discharged by such appointment. By the law as modified by the Revised Statutes: (1) In no case is the debt of the executor discharged by his appointment as such by the will of his creditor. (2) Nor can such an appointment operate as a bequest of the debt to the debtor. (3) Legatees and next of kin are entitled to share in the debt as assets in the hands of the executors. (4) A judgment is assets in the hands of the executor, but, as he cannot be sued at law, it is by the statute converted into money, and he is bound to dispose of it as such.

SOVERHILL v. SUYDAM ..... 400

EXECUTORS AND ADMINISTRATORS: *See* ADMINISTRATOR; WILL, 12.

FALSE REPRESENTATIONS: *See* ARREST AND BAIL; CONTRACT, 13.

FEES: *See* FORECLOSURE, 1.

FRIGNED ISSUE: *See* PRACTICE, 10.

FENCES: *See* RAILROADS, 2, 3, 4.

FINDINGS OF FACT: *See* REFERENCE, 4.

FIRE INSURANCE: *See* INSURANCE, 2, 3, 4, 5, 6, 7, 8, 13, 14, 16, 17.

FORECLOSURE—*Referee's fees. Appealable order.*] An order of the special term made on a summary application after judgment, allowed \$100 to a referee appointed to sell under a foreclosure judgment. *Held*, that it charged the owner of the equity of redemption with a greater sum than was lawful, and therefore affected a substantial right and was appealable. *Held*, also, that a referee appointed to sell in a foreclosure action is entitled only to the same amount allowed by law to a sheriff for the performance of a similar duty.

INNES v. PURCELL ..... 538

2. ———, *Opening sale.*] During the pendency of an action to foreclose a mortgage, the plaintiff agreed with the mortgagor that he would, at the foreclosure sale, purchase the mortgaged property for the amount of the judgment. At the sale, the property was bid in by a son of plaintiff for a small sum, and a judgment for deficiency for the greater part of the mortgage debt entered against the mortgagor. *Held*, that it would be unconscionable and inequitable to allow the sale to stand.

CRANE v. STIGER ..... 577

3. ———, *Laches—rights of purchaser.*] The sale was made in April, 1872. The mortgagor did not give notice of a motion to have it opened until March 31, 1873. *Held*, that the laches of the mortgagor only affected the terms on which he should be relieved, and the purchaser had not acquired a vested right which could not be interfered with by the court. *Ib.*

FORECLOSURE — *Continued.*

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4. ———, *Tender before action brought — Judgment — costs.*] In an action to foreclose a mortgage, defendants pleaded tender of the amount due before action brought. This defense was established upon the trial. *Held*, that the plaintiff was not entitled to a judgment of foreclosure, but to a money judgment against the defendants diminished by the costs of the defendants.  
McCoy v. O'Donnell..... 671

5. ———, *Opening sale.*] In an application for a re-sale of mortgaged premises upon the ground that the premises sold did not bring their full value, the moving affidavits showed, not what was the true market, but a speculative value. *Held*, that a re-sale should not be ordered.  
Barnes v. Stoughton..... 675  
*See* MORTGAGE, 6; PARTNERSHIP, 5.

FOREIGN JUDGMENT: *See* CONFLICT OF LAW, 1, 2, 4.

FORGED INSTRUMENT: *See* PROMISSORY NOTE, 7.

FORMER ADJUDICATION: *See* EVIDENCE, 11.

FRAUD: *See* DEED, 2.

FRAUDS, STATUTE OF: *See* STATUTE OF FRAUDS.

- FRAUDULENT CONVEYANCE — *Rights of grantee — consideration.*] The defendants, in order to defraud creditors, by voluntary deed, conveyed certain real estate to plaintiff's intestate. Afterward they asked the intestate to reconvey the property to them which he refused to do unless a mortgage for \$1,200 was executed back to him. The mortgage was executed and he reconveyed the property. *Held*, that the fraudulent conveyance could not be impeached by defendants; the intestate was entitled to require the mortgage as a condition of reconveyance, and the consideration of the mortgage was valid.  
Mapes v. Snyder..... 818

2. ———, *Attorney and client — undue influence.*] A transfer was made by an embarrassed client, of all his personal property, to his attorney and counsel under the advice and suggestion of the latter, without any actual consideration, but for the purpose of having the property held by the attorney for the sole use and enjoyment of the client, so long as it was in danger of being seized by his creditors, and then of restoring the formal title to the client. *Held*, that, as between the parties, this transfer was void, and should be annulled for the purpose of relieving the client, if that could be done without injury to an innocent purchaser.  
Goodenough v. Spencer..... 508

3. ———, *Purchasers with notice.*] And the attorney having assigned the bill of sale of the property to a party who had notice, before he took the assignment that the bill of sale was given by a client to his attorney for professional services, and that the property still remained in the possession of the client; *held*, that the fact of the assignee's failing to make the inquiry suggested by the vendor's continued possession was sufficient to render him responsible for all the information such an inquiry would have secured. And that that affected the title he acquired with all the infirmities it had in the hands of his assignor. *Ib.*

4. ———, ———.] *Held*, also, that under this defect in the assignor's title, the assignee stood precisely where his assignor did before the assignment, holding it in subordination to the vendor's right to annul the sale, as being the result of undue influence exercised by his attorney and counsel over him in procuring it. *Ib.*

5. ———, *Demurrer.*] Plaintiffs, in their complaint, stated that A was, in his life-time, indebted to them, that he caused to be conveyed to

FRAUDULENT CONVEYANCE—*Continued.*

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defendant, his wife, real estate paid for by him, and conveyed to her, through a third person, other real estate owned by him, and afterward, at his own expense, improved said estate; that the conveyances were made and accepted with the intent to defraud A's creditors, and that A died insolvent, and defendant was appointed his administratrix, and had no personal property of deceased to pay plaintiffs' debt, and that deceased left no other real estate, and asked that the conveyances be set aside, and plaintiffs' debt be charged upon said real estate. *Held*, that the complaint contained sufficient facts to constitute a cause of action, and a demurrer, upon the ground that it did not, would not lie.

SPICER v. AYERS ..... 626

- 6 ———, *Implied trust.*] *Held*, also, that the conveyance to defendant of the lands paid for by A created a trust in favor of the creditors of A, and an equity action would lie (1 R. S. 747, §§ 51, 52) to enforce that trust. *Ib.*

7. ———, *Equitable action.*] *Held*, also, that defendant being both the administratrix of the deceased, and the party holding the fraudulent title, and the estate being insolvent, a creditor at large could maintain an action in equity for relief. *Ib.*

8. ———, *Undue influence—evidence.*] In an action to set aside a deed, upon the ground of fraud and undue influence, it was shown that the person procuring the deed had strenuously urged the one making it, who was a married woman and of a low grade of intelligence, to do so without consulting her husband or relations. *Held*, that while this was a suspicious circumstance, mere suspicion of undue influence was not enough, it must be proved.

ANDREWS v. RAYMOND ..... 661

*See* STATUTE OF LIMITATIONS, 2, 3; VOLUNTARY DEED.

FRIVOLOUS ANSWER: *See* PLEADING, 8.

GRANT: *See* STATUTORY CONSTRUCTION, 10.

GRANTOR AND GRANTEE: *See* FRAUDULENT CONVEYANCE, 1.

HIGHWAYS—"Alteration" of.] The widening of a highway is an "alteration" of it. It is not the "laying out" of a new highway.

PEOPLE *ex rel.* LASHER v. MCNEIL ..... 140

2. ———, *Irregular proceedings.*] Upon a hearing before referees, on appeal from an order of commissioners altering a road, irregularities anterior to the order of the commissioners cannot be considered; nor can such irregularities be considered upon *certiorari* to the referees. *Ib.*

3. ———, *Opening—discontinuance.*] A highway was regularly laid out, part of the damages resulting from the opening of the same released, and the remainder assessed in accordance with law. After this, the highway commissioner refused to open the highway, and upon application, instituted proceedings to discontinue it. An order of discontinuance was made and filed. *Held*, that the highway having been regularly laid out, and the damages released or assessed, it was the duty of the commissioner to open it. *Held*, also, that the highway not having been opened, could not be discontinued, and the proceedings for that purpose were invalid.

PEOPLE *ex rel.* MILLER v. GRISWOLD ..... 351

4. ———, *Alteration of—order for—former order reversed on appeal.*] A commissioner of highways made an order altering a highway. From this order an appeal was taken, and the matter referred to referees who reversed the determination of the commissioner. Within a year after the decision of the referees was filed, an order was made by another commissioner, directing the same alteration as the first

HIGHWAYS — *Continued.*

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order. *Held*, upon *certiorari*, that the second order was in contravention of the provision of the statute (Laws 1847, ch. 455, § 9), that a decision of referees in a highway appeal "shall remain unaltered for the term of four years from the time the same shall have been filed in the office of the town-clerk."

PEOPLE *ex rel.* DORN v. JONES..... 360

5. ———, *Certificate of freeholders.*] The owners of the land to be taken for the alteration of a highway consented to the taking of the same, and filed a release of damages in the town-clerk's office. *Held*, that a certificate of freeholders, of the necessity of the alteration, was not necessary. *Id.*

*See* APPEAL, 4; RAILROADS, 1.

HUSBAND AND WIFE: *See* AGENCY, 1, 2; EVIDENCE, 1, 2; JURISDICTION, 2.

INDENTURE: *See* APPRENTICESHIP.

INDICTMENT: *See* CRIMINAL LAW, 1; EMBEZZLEMENT, 1; SEDUCTION, 1.

INDORSEMENT: *See* PROMISSORY NOTES, 3, 4, 5.

INFANTS: *See* APPRENTICESHIP.

INJUNCTION — *Action before different courts.*] Plaintiff brought action against an insurance company to recover the amount of an insurance upon the life of her husband. Certain residents of Maryland, who claimed an interest in such insurance, and to whom the policies were made payable, were joined as defendants. They appeared and defended. Afterward they brought an action against the insurance company in the United States court in Maryland, to recover the amount due upon the same policies. *Held*, that an injunction would not issue to restrain defendants from prosecuting such last-named action.

BARRY v. MUT. LIFE INS. CO..... 15

2. ———, *Sale of stocks deposited as a "margin."*] It was alleged in the complaint that defendants, a firm of stock brokers under claim of, but without right, were about to sell certain shares of stock deposited by plaintiff with them as a "margin" in a speculative transaction; that such sale would inflict irreparable injury upon plaintiff, and that the stock could not be then sold without a ruinous sacrifice by reason of a low market, and an accounting was demanded. *Held*, that plaintiff was not entitled to an injunction restraining the sale.

PARK v. MUSGRAVE..... 571

*See* NUISANCE, 1.

INNKEEPER — *Lien upon property of master for entertainment of servant.*] C., an employee of plaintiff, applied for entertainment at defendant's inn, and was furnished a room. He was afterward informed that the regular price for a guest was \$6 per week, which he should be charged. Subsequently he brought to the inn a horse and wagon, belonging to plaintiff, which he used in plaintiff's business. C. left the inn owing a balance for his entertainment, and defendant retained plaintiff's horse, etc., as security for such balance. In an action by plaintiff to recover possession of such horse, etc., *held*, that the relation of innkeeper and guest existed between defendant and C., and that, even though C. was a boarder, defendant had a lien on the horse, etc., for the amount due from him.

SMITH v. KEYES..... 650

- 2 ———, *Claim and delivery — amount of judgment in action for. Practice — correcting judgment on appeal.*] The referee before whom the case

INNKEEPER — *Continued.*

PAGE.

was tried gave defendant judgment for the return of the property, or its value in case a return could not be had. *Held*, that defendant was entitled to judgment, not for the whole value of the property, but only for the amount due from C. *Held*, also, that the court, on appeal, might correct the judgment so as to conform to the proofs, by reducing it to the amount of defendant's claim. *Ib.*

INSURANCE — *Life policy — conditions — erroneous statements in application — when they avoid policy.*

[A life insurance policy contained a provision that fraud or intentional misrepresentation should vitiate it, and that the statements in the application were warranties and in all respects true, and that no fact relative to the insured affecting the interest of the company which, whether material or not, would tend to influence the company to take the risk, was suppressed or omitted. The application upon which the policy was given contained a provision that the answers to the questions therein, and the statements made to the examining physician and signed by him, and the insured were warranties correct and true, and that there was not concealed or unmentioned therein any circumstance in relation to the past or present state of the health, habits of life, condition or intention of the insured, or any other fact concerning him, his relatives or ancestry with which the company should be made acquainted; and that if the statements, etc., were not true and correct the policy should be void. Certain of the statements in the application were incorrect. It was stated that the insured never had any illness or local disease, while he had had some years previously a slight disease of the eyes; that a physician had never attended him, when three years before a physician had attended him; that his vocation was, and had been, a traveling agent, when, in fact, he was at one time a painter, and had been in the army; that he had lived in New York, and he did not state the fact that he had been in Virginia. *Held*, that the statements were warranties, and being untrue, whether as to material matters or not, the policy was avoided.]

FITCH v. AM. POP. LIFE INS. CO. . . . . 247

2. —, *Fire policy — parol evidence as to subject of.* In a policy of insurance upon personal property, situated in farm buildings, and in the application therefor, the expressions employed were inaccurate and uncertain, to such a degree as to render it doubtful which buildings were meant. *Held*, in an action upon such policy, for loss, that it was competent to explain the ambiguity in the policy and application by extrinsic evidence.

BOWMAN v. AGRICULTURAL INS. CO. . . . . 261

3. —, *Waiver of conditions.* An insurance policy contained a provision that the premium was due and payable upon the delivery of the policy, but where credit was given the premiums should be paid within four months from the date of the policy, and, if not paid within that time, the company should not be liable for any loss that might occur. It also contained a provision that no agent of the company was permitted to waive any stipulation or condition contained therein. *Held*, that the provision as to payment might be waived by the company, or its authorized agent, and this waiver might be by parol. *Ib.*

4. —. Plaintiff had insured with defendant, an insurance company, certain property, by a policy containing the above-named provisions. The arrangements were made with an agent; the policy was sent by the company directly to plaintiff, without requiring prepayment, and without any limitation of credit being suggested. *Held*, that it was for the jury to determine whether the provisions of the policy were waived. *Ib.*



INSURANCE—Continued.

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5. ———, *Fire policy.*] The doctrine that the assured is bound, although no inquiry be made, to disclose any fact within his knowledge, is not applicable, at least, to its full extent to policies of insurance against fire.  
                   PEOPLE v. LIV., LOND. AND GLOBE INS. CO..... 268
6. ———, *Concealment of facts by insured.*] In an action upon a fire insurance policy, a defense was that carpenter work was being done in the building insured, which was not disclosed to the insurers. There was no actual concealment or fraud proved, no misrepresentation or intentional suppression of facts, nor was any inquiry made, at the time of issuing the policy, as to the uses for which the building was to be applied. *Held*, that it was for the jury to say whether there was a concealment of the facts by the insured which would avoid the policy. *Ib.*
7. ———, *Insurable interest.*] The trustees of an asylum, in pursuance of an act of the legislature, conveyed such asylum to the people, and a fire insurance policy was issued in the name of the people. *Held*, that the people had a right to insure in their own name for the benefit of the owners, and to bring action as trustees for a loss on the policy. *Ib.*
8. ———, *Limitation of action on policy.*] By a provision of a policy "in any case of a disputed claim," no action should be maintained unless it was instituted "within twelve months after the alleged cause of such claim." After a loss on the policy, proofs of loss were forwarded to the insurers, who made several formal objections to their sufficiency, and asked for further proofs, but made no objection to the claim for loss. *Held*, that the insurers, by making only formal objections to the sufficiency of the proofs, admitted that the claim was not a disputed one, and waived, for the time, the provision as to the time of commencing an action and an action could be brought after the expiration of the twelve months. *Ib.*
9. ———, *Life policy—representations in application for policy—question of fact.*] In an application by plaintiff for insurance on the life of her husband, she stated that he was in good health, and usually had good health, that she had not concealed any material fact in relation to his health. To a question whether his parents, brother or sister had been afflicted with scrofulous disease, she answered no. To another question she answered that his mother died of scrofula. She further stated that one of his brothers died of an unknown disease, and one of his sisters of disease of the blood. She was not asked if her husband ever had scrofula. The insured person told the examining physician of the company that his mother died of scrofula, and in reply to a question said he never had any of that disease that he was aware of. He died about nine months after the issue of the policy of an abscess caused by scrofula. Evidence was given tending to show that the insured had, on several occasions, some years previous to insuring, been in feeble health. Other evidence showed that, with one or two exceptions, his general health had always been good, and had been especially so, with the exception of a slight lameness, for about four years immediately preceding the issue of the policy. *Held* (1), that the question whether plaintiff and the insured misrepresented the true condition of the health of the insured was one of fact for the jury; (2), that the statement that the parents, brothers or sisters of the insured had not been afflicted with scrofulous disease, taken in connection with the statement that his mother died of scrofula and his sister of disease of the blood, was not untrue, in such a way as to avoid the policy.  
                   SWIFT v. MASS. MUT. LIFE INS. CO..... 302

INSURANCE — *Continued.*

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10. ———. At the time the insured was examined he had an abscess. *Held*, that it was for the jury to determine whether he acted in good faith in the representation that he had no symptoms of scrofula that he was aware of. *Ib.*
11. ———, *Construction of language in application — evidence.*] It was in evidence that the word "unknown" disease was inserted in the application by defendant's agent, in lieu of the statement actually made, that the party did not know of what disease the brother died. *Held*, that it was for the jury to determine what construction should be put upon the word "unknown," whether as referring to the knowledge of the party, or of everybody. *Ib.*
12. ———, *Declarations of insured.*] Statements made by the insured to others than the insurance company and the physician in relation to his health, *held inadmissible.* *Ib.*
13. ———, *Fire policy — conditions in — notice of loss — agency.*] A policy of insurance against fire contained a condition that persons sustaining damage by fire "are forthwith to give notice thereof to the company." The insurance was effected through an agent of the company located in a town adjoining that in which the insured property was situated. The policy was issued through him, and contained an indorsement of his name, as agent, placed thereon by the company. *Held*, that notice of loss to such agent was notice to the company, and this was not affected by the fact that he was authorized to do business only in the town where he was located, such fact not being known to the holder of the policy.

KENDALL v. HOLLAND PURCHASE INSURANCE COMPANY..... 375

14. ———, ———.] The provision in question imposed upon the insured no more than due diligence under all the circumstances of the case. *Ib.*
15. ———, *Life policy — application for policy not signed by applicant.*] The agent of a life insurance company received from J. a written application for a policy. Without the knowledge of J., the agent copied the application into the blanks of another company, of which he was also agent, and the second company issued a policy to J. upon such application. This company received from J. several premiums upon such policy. *Held*, in an action upon the policy by the representatives of J. after his death, that it was no defense that the application for the policy was not made or signed by J.

BOHRENGER v. EMPIRE MUT. LIFE INS. CO..... 610

16. ———, *Waiver.*] By the conditions of a fire insurance policy, the insured was, in case of loss, required to give immediate notice thereof to the company, and where the loss was that of personal property, to furnish an inventory of the goods lost, etc. Plaintiff's stock of goods which were insured were damaged by fire. He immediately notified the local agents of the company through whom had been issued the policy; they took possession of the damaged goods, and proofs of loss were made out and forwarded to the company in accordance with the directions of such agents. More than a month after receiving such proofs the company rejected them as insufficient, not being in compliance with the requirements of the policy. *Held*, that by neglecting to reject and return the proofs of loss within a reasonable time, the company waived any objections thereto or defects therein.

BUSH v. WESTCHESTER FIRE INS. CO..... 629

17. ———, *Local agent — authority of.*] *Held*, also, that the local agents of the company, having an apparent authority to do so, could waive a strict compliance by plaintiff with the terms and conditions of the policy, although, by their power of attorney from the company, they were unauthorized to do so, plaintiff being ignorant of the restriction.

INSURANCE—Continued.

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And a demand of the company more than a month after receiving notice that plaintiff should comply with the strict requirements of the policy was a nullity. *Ib.*

18. ———, *Evidence.*] Plaintiff who purchased and owned the goods destroyed, his clerk who was familiar with the goods and the business, and a person who made plaintiff's store his office and who had sold plaintiff some of the goods, were asked the amount and value of the goods in the store at the time of the fire. *Held*, that their testimony was admissible. *Ib.*

See INSURANCE DEPARTMENT.

INSURANCE DEPARTMENT—*funds deposited with superintendent—when receiver of company is not entitled to.*] In an application by the receiver of a life insurance company, for an order directing the superintendent of the State insurance department to assign the funds deposited with him by the company for the security of policy-holders, in order to enable the receiver to resist suits for disputed claims, *held*, that there is no provision of law for withdrawing the securities in the hands of the superintendent for such a purpose.

RUGGLES v. CHAPMAN ..... 600

INTENT: See WASTE, 2.

INTEREST—*When it begins to run.*] Where, by contract for the performance of work, a certain per cent is to be deducted from the monthly payments and retained until the entire performance of the contract, the amount is due on the completion of the work, and bears interest from that time.

JENKS v. ROBERTSON ..... 255

2. ———, *Computation by referee.*] A referee was appointed to determine upon the priority and amount of claims to surplus moneys. He computed the claims with interest to the day of the date of his report. The special term affirmed the report, and did not postpone the day to which interest should be computed thereon. *Held*, that the general term would not review the order of the special term, it having exercised the discretion vested in it.

SOVERHILL v. SUYDAM ..... 460

3. ———, *Computation of.*] Defendant claimed and was allowed for board of plaintiff \$4 per week. *Held*, that there being no evidence that the board was to be paid at the end of each week, the refusal of the referee to compute interest thereon from the end of each week and computing from the end of the year was proper.

LEACH v. LEACH ..... 657

4. ———, *Rule of, a question of law, etc.*] The rule of interest was a question of law which could be raised only by an exception so specific as to call attention to it. *Ib.*

See CORPORATION, 4.

JOINDER: See EVIDENCE, 18; PARTIES; PLEADING, 4; PRACTICE, 1.

JUDGMENT—*opening upon condition—vacating.*] The court has the right to impose it, as a condition of opening a default, that there shall be a reference and a speedy trial. If the defendant does not choose to take the order with the condition, he is at liberty to decline its benefits, and allow the judgment to stand; or, he may appeal from that part of the order imposing the condition. But, after proceeding upon the order, and after a judgment has been entered against him upon the referee's report, he cannot move to set aside the judgment as irregular.

DELANY v. DELANY ..... 580

See ACTION, 8; EXECUTOR; FORECLOSURE, 4; JUSTICE'S COURT; PARTNERSHIP, 9, 11; PRACTICE, 9.

- JUDICIAL OFFICE: *See* CONSTITUTIONAL LAW. PAGE.
- JURISDICTION — *Recorders of cities.*] Recorders of cities have jurisdiction under 2 R. S. 704, § 1, to require disorderly persons to give security to keep the peace, and in default thereof, to commit them to the common jail.
- PEOPLE *v.* MITCHELL..... 173
2. ———, *Husband and wife — neglect to support wife.*] It is no defense to a complaint against one for a breach of the peace in neglecting to support his wife, that he has brought an action of divorce against her, in which he has appealed from a judgment against him to the court of appeals, and that he has paid her a gross sum, awarded to her in that action, for alimony. *Ib.*
- See* BANKRUPTCY, 2; CONFLICT OF LAW; STATUTORY CONSTRUCTION, 10.
- JUROR: *See* CRIMINAL LAW, 2.
- JURY TRIAL: *See* PRACTICE, 5; REFERENCE, 2; TRIAL, 1.
- JUSTICE'S COURT — *absence of plaintiff at rendition of verdict.*] At a trial before a justice of the peace, the verdict of the jury, in favor of plaintiff, was received by the justice and entered in the absence of the plaintiff. *Held*, that a judgment for plaintiff was erroneous and that the defendant could take advantage of the error.
- BOARD OF EXCISE OF MARION *v.* TURK..... 367
- JUSTICES OF SESSIONS: *See* CONSTITUTIONAL LAW.
- JUSTICES OF THE PEACE: *See* CONSTITUTIONAL LAW.
- LACHES: *See* FORECLOSURE, 3; MORTGAGE, 5; PARTNERSHIP, 6.
- LANDLORD AND TENANT — *summary proceedings — summons, when returnable.*] In proceedings under the statute, relative to summary proceedings to recover the possession of land, against a tenant holding over, the summons, in certain cases, may be made returnable in less than three days; but when so returnable, it must be on the same day it issues. A summons returnable the next day after it is issued is void.
- PEOPLE *ex rel.* LEARY *v.* LANE..... 522
2. ———, *Covenant to repair — what repairs are.*] In a lease the lessee covenanted to keep the leased building in good repair and condition. At the time he took possession the roof and steps were in bad condition. The lessee made such repairs only as were required for his own comfort, and the steps became rotten and the roof leaked so as to injure the walls. After the lessee's term expired the lessor had the roof shingled, gutter repaired and new steps made. *Held*, that these were repairs within the covenant of the lease, and that the lessee was liable for the expense of making them.
- GREEN *v.* EDEN ..... 582
3. ———, *Redemption by tenant after removal. Equitable relief.*] S. leased from defendant, premises for a term of ten years, but was removed before the expiration of five years, for non-payment of rent. The plaintiff as receiver of S., within a year after delivery of the premises to the landlord, sought to redeem under the statute (Laws 1842, ch. 240), and for that purpose tendered fifty dollars, claiming that that sum together with the rents received by the landlord, while in possession, from the sub-lessees of S., was sufficient to pay all rent in arrear and all costs and charges incurred by the landlord. The landlord refusing to restore the premises, plaintiff brought this action, setting out in the complaint the foregoing facts, and asking that he be restored to possession and for general relief. The court below treating the action as simply one for possession, held the tender insufficient, and rendered judgment for defendant. *Held*, error; under the prayer for general relief the plaintiff was entitled to an accounting.
- WATERS *v.* CRAWFORD ..... 602
- See* SUMMARY PROCEEDINGS; LESSOR AND LESSEE.

LEASE — *Covenant in.*] A lease of a farm from B. (the plaintiff) to D. contained the following provision: "Whenever any of the products of said farm shall be sold or disposed of, all proceeds shall be paid to said B., until he shall receive the full rent of said farm yearly." *Held*, to be a mere personal covenant, and that it gave the lessor no lien upon the proceeds of the farm for his rent.

BARBER v. MARBLE..... 114

2. —, *Pleading — complaint — sufficiency of.*] Defendant forwarded to New York a quantity of butter, the product of said farm, placed in his hands by the lessee, sold the same and received the proceeds therefor. Subsequently, the lessee surrendered his lease by a written release, including the products of the farm and the proceeds of the butter in question, which were specifically mentioned. In an action for the proceeds of the butter, in the complaint, plaintiff claimed a right to such proceeds under the provisions of the lease, and also alleged "That said plaintiff was entitled to said proceeds, and that he claimed the same, and that previous to receipt of said proceeds the plaintiff notified the defendant that plaintiff claimed the proceeds of said butter, and before the commencement of this action said proceeds were duly demanded of defendant and refused," etc. The assignment contained in the release was not specially pleaded in the complaint. Defendant's answer, among other things, alleged that said proceeds were not the property of the plaintiff, but of the lessee, and that plaintiff had no claim or lien on them. At the trial the release was introduced in evidence, without objection on the part of defendant. *Held*, that with the aid of § 173 of the Code, liberally applied in furtherance of justice, a recovery could be upheld. *Ib.*

*See* LANDLORD AND TENANT, 2; LESSOR AND LESSEE.

LESSOR AND LESSEE — *surety upon lease.*] By the terms of a lease the lessees were to pay the agreed rent by a note, falling due and to be paid at a specified time. *Held*, that the giving of the note did not discharge a surety for the lessees upon the lease, but that such surety remained liable until the note was paid.

WOODBIDGE v. RICHARDSON..... 413

2. —, *How far surety liable.*] The lessees covenanted to keep the leased property insured. The insurance policy being about to expire, the lessees requested the lessor to obtain a renewal of the insurance, which he did. *Held*, that the surety was not liable for the amount of premium paid by lessor for such renewal. *Ib.*

LEGACY: *See* RELEASE, 3; WILL, 5, 8, 9.

LIBEL — *examination of party as a witness — refusal to answer — striking out complaint.*] In an action for libel, the complaint alleged that the plaintiff was the proprietor and manufacturer of certain articles of medicine known as "Dr. Richau's Golden Remedies," of which the sales and profits were large; that the defendants had, in a magazine published by them, characterized his Golden Remedies as "nonsensical quackery," etc., and as valueless, and possessing no medicinal qualifications whatever. The defendants, in their answer, alleged that the publication was substantially true, and made with good motives, and for justifiable ends. The plaintiff, being examined by the defendants as a witness on their behalf, under an order of the court, was directed by the judge to state of what ingredients certain of his remedies were composed. He refused to answer, otherwise than by saying it was "a secret compound of various ingredients of great medicinal properties." *Held*, that the answer was evasive, and that the court properly ordered the complaint to be stricken out and dismissed, with costs.

RICHARDS v. JUDD..... 479

LICENSE: *See* EXCISE LAW.

- LIEN:** *See* INNKEEPER, 1. PAGE.
- LIFE INSURANCE:** *See* INSURANCE, 1, 9, 10, 11, 12, 15.
- LIMITATION OF ACTION:** *See* INSURANCE, 8.
- LIMITATIONS, STATUTE OF:** *See* STATUTE OF LIMITATIONS.
- MANDAMUS:** *See* SCHOOL LAW, 1; STATUTORY CONSTRUCTION, 2, 4, 5; TOWNS, 1.
- MANSLAUGHTER — Repeal of statute — saving clause —** *Laws 1869, chap. 681 — Laws 1872, chap. 181.* Plaintiff was indicted, tried and convicted of manslaughter in the second degree under Laws 1869, chap. 681, § 1, relating to abortions. The act was committed March 15, 1872, and the indictment, trial and conviction were had April 24, 1872. On the 6th of April, 1872, a law was passed (Laws 1872, chap. 181), changing the character of the offense and increasing the punishment. By § 5 of such law all acts and parts of acts inconsistent therewith were repealed, and by § 6 it was directed to take effect immediately. *Held*, that the provision in question of the act of 1869 was inconsistent with and was repealed by the act of 1872; and there being no saving clause in the latter act, the repeal was applicable to offenses committed prior to its passage as well as to prospective offenses, and under the provisions of that act plaintiff would not be liable to indictment for the offense he had committed.
- MONGEON v. PEOPLE**..... 128
2. — *general repealing act.*] But the provision of § 6 of the general repealing act of 1838 (3 R. S. 155; 1 Stat. at Large, 72), that "no offense committed, and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, shall be affected by such repeal," etc., is applicable to the law of 1869; and such statute continued in effect as to the offense and penalty, and the indictment, conviction and judgment against plaintiff were right. *Ib.*
- MARRIED WOMEN — contracts by.**] In order to maintain an action on the note of a married woman, it must be shown affirmatively that the debt was contracted, either for the purpose of carrying on a separate trade or business, or for the benefit of her separate estate, or for her own benefit on the credit of her separate estate.
- HALLOCK v. DE MUNN**..... 350
2. — *deed by — proof or coverture.*] A deed given by a woman in 1834 was objected to on the ground that she was married, and her husband did not join in it. The only evidence of her marriage was a description of her in her father's will as the wife of T. D. *Held*, that to exclude the deed, proof of coverture must be given; it could not be presumed, and the recital in the will was not evidence as against one claiming under the deed.
- CHRISTIE v. GAGE**..... 844
- See* AGENCY, 1; EVIDENCE, 1, 2; PLEADING, 2, 5, 6, 7, 8; PRACTICE, 2, 9.
- MASTER AND SERVANT:** *See* INNKEEPER, 1; NEGLIGENCE, 1, 3.
- MAXIMS:** *See* NUISANCE, 1.
- MECHANIC'S LIEN — Extent of.**] Respondent, under an agreement with the contractor, did work, by the day, upon appellant's building, from January 22d to March 5th, and again from April 8th to April 19th. He filed a mechanic's lien, under Laws 1854, chap. 402, for such labor, on May 11th, by which he claimed a lien for wages for the whole time he worked. *Held* (following *Spencer v. Barnett*, 35 N. Y. 94), that he was entitled to a lien for only the work done during the thirty days next preceding the time of filing his notice of lien.
- GOODALE v. WALSH**..... 811
- See* CONTRACT, 3, 4.

MISNOMER: *See* WILL, 8, 9.

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MISTAKE OF FACT — *Evidence — when parol admissible to contradict writing.*] The description in a deed, in consequence of a mutual mistake of the grantor and grantees as to the location of a point in a boundary line, embraced more land than was intended to be conveyed. *Held*, that equity could relieve against the mistake and reform the deed, and that such mistake might be shown by parol evidence.

BUSH v. HICKS..... 356

2. —, *Admissions of one in privacy with party.*] *Held*, also, that the admissions of one of the grantees under said deed, made while in possession, concerning the location of a boundary line, were evidence against himself and all those claiming under him. *Ib.*

*See* ADMISSION.

MORTGAGE — *Against estate of deceased person.*] A citizen of New York died leaving personal property there and real estate situate in South Carolina which was mortgaged. He left a will wherein he directed his estate to be divided among persons therein named. The will was proved in New York and also in South Carolina; in the latter State as a will of personal property only, it not being properly executed to convey real estate, and the real estate descended to the heirs. The heirs, by suit in South Carolina, recovered the real estate and obtained a decree that the executor under the will pay the mortgage out of the personal property. Afterward the executor petitioned the surrogate of New York for a final accounting, and cited the holder of the mortgage, who appeared and filed his claim. *Held*, that the mortgage creditor was not compelled, by 1 R. S. 749, § 4, to resort for payment to the land in the first instance, but might either foreclose the mortgage or resort to the personal property.

RICE v. HARBESON..... 4

2. —.] The object of the statute in question was not to interfere with the rights of the mortgage creditor, but to establish an equitable rule among the heirs and devisees. *Ib.*
3. —.] A court of equity, however, can compel the mortgage creditor to first exhaust his remedy against the mortgaged property, before resorting to the personal estate. *Ib.*
4. —, *Priority of lien.*] L. had a contract from B. for the purchase of certain premises for \$2,500, upon which he had paid \$100, April 1st. L. represented to plaintiff that he was the owner of such premises, and plaintiff then agreed to loan L. \$1,500 on a mortgage upon them. L. accordingly executed to plaintiff a bond for \$1,500; plaintiff paid him \$900, and it was agreed that plaintiff should send the remaining \$600 to L. on the following day, and that L. should execute the mortgage and deliver it for plaintiff to the county clerk for record. On the following day plaintiff sent L. the \$600. L. paid B. upon the contract \$900, April 2d, and \$500, April 3d. On the 6th of April, L. paid B. \$100, received from B. a deed of the premises, and gave back a mortgage to B. for \$900, the balance of the purchase-money. On the 14th of April, L. delivered to the clerk for record, his deed from B., and also the mortgage which he had agreed to execute to plaintiff. April 17, B. assigned his mortgage for \$900 to defendant, and on the following day, that mortgage was recorded. Neither plaintiff, defendant nor B. had notice of any of these transactions, except those in which they acted, as stated above, personally. *Held*, that the lien of plaintiff's mortgage was superior to defendant's.

DUSENBURY v. HULBERT..... 177

5. —, *Foreclosure and sale — When court will not set aside — Laches.*] Plaintiff, holding a mortgage, foreclosed it by action, and the mortgaged premises were, under the judgment in said action, sold July 7, 1867.

**MORTGAGE — Continued.**

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The owner of the equity of redemption was not served personally in the action, but was, in 1858, told by her husband, who had charge of her property, that the premises had been sold to pay interest, and that there was no relief. In the summer of 1870 she first learned all the facts of the sale, and, in October, 1871, moved to have the judgment of foreclosure and the sale set aside upon her paying the mortgage debt. *Held*, that it was too late to apply for an opening of the judgment and sale. The notice given the owner of the equity of redemption, in 1858, was sufficient to put her on inquiry, and imposed upon her the duty of diligence in asserting her claim; and further, that after gaining full knowledge of the facts in the summer of 1870, she was limited to a year thereafter, in which to make her motion, and not doing so within that time, was guilty of laches and not entitled to succeed.

DEFEW v. DEWEY . . . . . 515

6. ———, *Appealable order*.] The judgment and sale were opened by the court below. *Held*, that the order was not discretionary, but affected a substantial right and was appealable. *Ib*.

*See* ESTOPPEL, 1; FRAUDULENT CONVEYANCE, 1; PARTNERSHIP, 5.

MORTGAGE SALE: *See* FORECLOSURE, 2, 3.

MUNICIPAL BONDS: *See* RAILROAD AID BONDS.

MUNICIPAL LAW: *See* NEW YORK CITY, 1.

MUNICIPAL OFFICERS: *See* NEW YORK CITY, 2.

- NEGLIGENCE — *Master and servant*.] Defendant's foreman, who had charge of his shop, employed plaintiff's son, a boy twelve years old, to work in the shop. Under the foreman's direction, the boy worked upon a machine by which he was injured. *Held*, that the foreman stood in place of the master as to the subordinate employees of defendant, and his acts and negligence were the acts and negligence of defendant.

SIEGEL v. SCHANTZ . . . . . 353

- 2 ———, *Degree of care required of a child*.] A boy about twelve years old was killed at a highway crossing by defendant's railroad train: *Held*, that the boy was bound to exercise only such care as a person of his age, of ordinary prudence, would exercise, and under such rule it was for the jury to say whether the deceased was guilty of contributory negligence. Contributory negligence must be proved.

REYNOLDS v. N. Y. C. & H. R. R. R. Co. . . . . 644

3. ———, *Master and servant — duty of master to provide safe structures*.] Plaintiff's intestate, an employee of defendant, while in the discharge of his duty, was killed by the breaking down of a floor in defendant's brewery, upon which stood a mash-tub filled with boiling mash. The evidence tended to show that the floor was rotten, weak and insufficient to support the tub through the negligence of defendant in not making repairs. *Held*, that it was the duty of defendant to furnish a safe structure in which the duties of his servant were to be performed, and it was for the jury to determine whether he had negligently failed to do so.

MALONE v. HATHAWAY . . . . . 664

*See* RAILROADS; REAL PROPERTY, 3.

NEW TRIAL: *See* APPEAL, 2.

NEW YORK CITY — *Paving of streets — Laws of 1872, ch. 580, § 7 — Assessments — Former paving at owners' expense*.] Where a street in the city of New York has once been paved, at the expense of the owners of the lots, by consent of the common council, the case is not within the



NEW YORK CITY — *Continued.*

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exception contained in Laws 1872, chap. 580, § 7, which provides that assessments shall not be set aside or vacated on the ground of any irregularity in the publication of the ordinance, except where fraud shall be shown, and in cases of assessments for the repairing of any street, etc., upon property for which an assessment has once been paid for paving the same street, etc. Accordingly *held*, that a prior paving of a street at the expense of the property owners, without any assessment, was no reason for the vacation of a subsequent assessment for paving, on the ground that the ordinance directing the improvement had not been published for two days before its adoption by the common council.

PETITION OF ASTOR..... 488

2. ———, *Municipal officer accepting federal office.*] Plaintiff, while holding the office of counsel to the health department of the city of New York, accepted and held the office of chief supervisor of elections, under the act of congress passed February 28, 1871. *Held*, that under the provision of Laws of 1873, chap. 335, § 114, he thereby vacated the former office.

DAVENPORT v. MAYOR ..... 536

*See* ASSESSMENT; CONTRACT, 8, 9, 10, 11; STATUTES CONSTRUED, ETC.; STATUTORY CONSTRUCTION.

NONSUIT: *See* PRACTICE, 14; TRIAL, 8, 4.

NOTICE: *See* DEVISE, 2; EVIDENCE, 9; NUISANCE, 4; PROMISSORY NOTES, 2, 4; REAL PROPERTY, 3.

NUISANCE — *Burning brick with coal.*] Plaintiffs are the owners of improved lands, which they have been engaged in beautifying since 1857. Defendant is the owner of a brick-yard adjoining, upon which he burned brick by the use of mineral coal as a fuel, and in so doing sulphurous acid gas, which is poisonous to vegetation, was generated in quantities. When the south wind blew while the kilns were burning, this gas was carried upon the plaintiffs' land, and it had, by repeated attacks, destroyed many of their ornamental trees. Defendant's premises had been in use as a brick-yard, though not uninterruptedly, since before plaintiffs purchased their land, and for more than twenty-five years. *Held*, that plaintiffs were entitled to an injunction to restrain the defendant from using mineral coal in his process of burning brick. The maxim *sic utere tuo ut alienum non laedas* construed.

CAMPBELL v. SEAMAN..... 231

2. ———, *Prescription.*] A right to commit a legal nuisance cannot be acquired by prescription. *Ib.*

3. ———, *What necessary to maintain action.*] In an action for nuisance it is sufficient to show that the premises affected cannot be enjoyed without danger to health, or that their value is substantially impaired by the nuisance. *Ib.*

4. ———, *Overflow from mill-dam — notice to owner.*] In an action for damages for the overflow of a mill-pond it was shown that defendant, the owner of the pond, was not in possession, having leased the same to a third party. *Held*, that the owner of the premises overflowed could not recover for such overflow, without showing that defendant had notice or knowledge of the existence of the same before the action was brought.

MILLER v. CHURCH..... 259

*See* DEMURRER, 2.

OBJECTION: *See* EVIDENCE, 2, 3.

OFFER: *See* COSTS, 3.

OFFICE: *See* NEW YORK CITY, 2.

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OFFICER: *See* CERTIORARI; CORPORATION, 2, 3.

OFFICIAL BOND: *See* RAILROAD AID BONDS, 6.

ORDER: *See* ACTION, 8; COMMISSION.

ORPHAN ASYLUMS: *See* SCHOOL LAW.

OWNERSHIP: *See* CONSIGNOR AND CONSIGNEE.

PAROL AGREEMENT: *See* CONTRACT, 14.

**PARTIES** — *Joinder of — Action in nature of scire facias.*] In an action, brought as a substitute for a *scire facias*, to revive a judgment against a deceased debtor, *held*, that the heir at law of the judgment debtor, and the administrator of his estate, could not be joined as defendants.

STRONG v. LEE ..... 441

*See* ESTOPPEL, 2; PARTNERSHIP, 10; PRACTICE, 1, 2, 3.

**PARTITION** — *sale in — dower — Supreme Court rule 85.*] The amount payable to a doweress, in lieu of dower, from the proceeds of a sale in partition, is regulated by the Revised Statutes, and not by rule 85 of the supreme court.

BANKS v. BANKS ..... 483

*See* COSTS, 4.

**PARTNERSHIP** — *Dissolution — agreements between partners — construction of.*] In 1859, plaintiff and defendant's intestate each owned a bank in Wisconsin; plaintiff the C. bank, and the other the M. bank. They formed a copartnership, each contributing his bank, and together they contributed a bank known as the L. bank, and each contributed some money. The partnership thus formed continued until 1861, when it was dissolved. During the time the three banks continued to do business as such, and had transactions with each other, as though no partnership existed between the owners. At the time of the dissolution the books of the banks showed that the M. bank was indebted to the C. bank \$1,000, and that the L. bank was indebted to it \$3,000. Upon dissolution, plaintiff transferred to his partners all his interest in the M. and L. banks, and his partner transferred to him all interest in the C. bank. The partners agreed in writing that the M. and L. banks should pay plaintiff the \$3,000 due the C. bank, as soon as they conveniently could, with interest at the rate of 12 per cent; and defendant's intestate pledged "his honor to pay the balance" as soon as it could be done without pressing the banks. *Held*, that the indebtedness, if any, was not in favor of plaintiff against the two banks as such, but against the intestate, arising out of partnership transactions; that there was not shown to have been a final accounting between the partners, or an express promise on the part of the intestate to pay, and that plaintiff could not recover.

BLOSS v. CHITTENDEN ..... 11

2. —, *Final accounting — express promise to pay.*] The rule in this State is well settled, that one partner cannot recover at law against another, except after a final accounting, balance struck, and express promise to pay. *Ib.*

3. —, *Transactions between partners — void transfers.*] Defendant and a younger brother were copartners in business, carrying on two extensive establishments. The brother, in consequence of unfortunate private transactions and ill health, became mentally enfeebled. While in that condition, at the earnest solicitation of defendant, the brother consented to the transfer of his interest in one of the establishments upon the books of the firm to the defendant and ordered it to be done. At about the same time, he conveyed to the defendant by deed all his

PARTNERSHIP—Continued.

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interest in real estate, of considerable value, owned by the firm. About nine months afterward, the brother being sick at home, defendant caused to be made out an erroneous balance sheet, wherein, by means of false and improper entries, the interest of the brother in the firm property was made to appear very small in amount, although, at the time, the real amount or value of his interest was very large. The defendant at the time expressed a determination to wipe out his brother's interest altogether. The brother took no part in making out this balance sheet, and did not consent to the methods employed in making it, but was induced by defendant to transfer, in consideration of the amount of his apparent interest upon such balance sheet, his interest in the second establishment. On the same day he conveyed by voluntary deeds valuable lands owned by him in Cayuga and Wayne counties, and three days thereafter, by voluntary deed, valuable real estate in New York owned by him, and constituting the remainder of his property. This last conveyance was proved to have been made in consequence of threats and promises of defendant at the time. While these transfers were being negotiated, defendant held out to the near relatives and friends of his brother that it was necessary to do what was being done in order to prevent the brother's property being seized to satisfy his individual liabilities, and to avoid embarrassment to the firm business, but there was no evidence that the brother transferred his property to avoid payment of his debts, and he had no reason so to do. At the time of the transfer of the first establishment, the knowledge of the condition of the business of the same was exclusively with defendant, and the brother never knew how it stood, and in this action defendant declined to produce such account books as were kept in connection with it. In an action by the executors of the brother to set aside the transfers of the property, on the ground of fraud and undue influence, *held*, that the burden of proof was with the defendant to show that the transfers first made were the result of investigation, and that the consideration was fair and adequate, or, at least, arrived at after the brother had the same light that defendant possessed.

PLATT v. PLATT..... 26

4. —, *Undue influence.*] *Held*, also, that the relation of blood and that of trust growing out of the partnership indicated, when taken in connection with the brother's feeble state, the existence of dominion and influence, and called for proof of the purity of the transactions. Plaintiffs established affirmatively the existence of undue influence, which not being controverted by defendant, the transfers should be set aside. *Ib.*
5. —, *Collusive foreclosure.*] Certain mortgages upon the real estate were foreclosed at the instigation of the defendant, who purchased at the foreclosure sales. *Held*, that he acquired no better title thereby. *Ib.*
6. —, *Laches.*] The plaintiffs waited some years after they were entitled to bring the action before commencing it. *Held*, that they were not guilty of laches, the statute not having run and no estoppel or acquiescence being shown. *Ib.*
7. —.] Equity will scrutinize agreements between partners closely and watchfully, and will not permit them to stand if it can discover that they were brought about by concealment, unfairness, or other unconscionable conduct. *Ib.*
8. —, *What is not—special agreement.*] S., by contract in writing, agreed to work the farm of C. on shares, and to take a certain number of cows and keep them in a certain manner. It was also verbally agreed that a ton of feed should be purchased for the cows and that each should pay for one-half thereof. S. bought the feed of plaintiff,

## PARTNERSHIP — Continued.

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- acquainting him with the agreement. *Held*, that such an agreement did not render S. and C. partners in the purchase of the feed, and that each was severally liable only for one-half the purchase price.  
 ANGELL v. COOK ..... 175
9. ———, *Practice — modification of judgment.*] An action was brought in a justice's court against S. and C., jointly, for the price of the feed. Judgment was rendered in favor of plaintiff, which was affirmed by the county court, upon an appeal by C. *Held*, that the pleadings might be amended to meet the case (Code, § 64, subd. 11), the name of S. stricken out as an unnecessary party (Code, § 173), and the judgment affirmed against C., to the extent of one-half the amount rendered in the courts below. *Ib.*
10. ———, *Conspiracy of partner with third party — Equitable relief — Parties.*] E. and W. conspired to have a debt owed by E. to W. paid with the assets of a firm in which E. was copartner, and E. gave W. the firm note for that purpose. W. began an action upon the note, and procured an attachment against the firm property. Plaintiffs, who were the remaining members of the firm, began an equitable action, setting forth the above facts and the insolvency of the firm, and asking that such firm be dissolved, a receiver appointed, an accounting had, and that W. be restrained from interfering with the partnership effects, and that his attachment be declared a lien upon the interest of E. only. *Held*, (1) that an objection that plaintiffs had an adequate remedy at law could be taken only by demurrer or answer; (2) that plaintiffs were entitled to the relief demanded; (3) that W. was a proper party defendant.  
 JENNINGS v. WHITTEMORE ..... 377
11. ———, *Evidence — former judgment.*] In the complaint plaintiffs set up the pendency of the action by W. against the firm. In that action the plaintiffs in this action defended, and were successful. *Held*, that the judgment in the first-named action was admissible in evidence at the trial of this action. *Ib.*
12. ———, *Transactions in real estate — verbal agreement — rights between partners.*] Plaintiff claimed to have loaned defendant certain moneys for which he brought action. Defendant claimed that the moneys had been advanced by plaintiff in a partnership agreement made verbally for the purchase of and sale of particular lands. The lands in question had been purchased by defendant, and a deed taken in his own name two months before the money was received by him. *Held*, that, even if the money was advanced upon a partnership agreement, it being verbal, plaintiff had no interest in the lands and might recover the sum advanced in an action therefor.  
 TOMPKINS v. LEE ..... 589
13. ———, *Statements made by partner — when binding on firm.*] Plaintiffs' being requested by K. to sell goods to him on credit, asked defendants, a firm in business, in the same city with plaintiffs, concerning the responsibility of K., and were told by one of the defendants that the store carried on by K. was a branch of defendant's house. Believing this, plaintiffs gave K. credit. *Held*, that such a statement by one of the partners bound defendant's firm, whether true or false.  
 COMSTOCK v. WARNER ..... 663
- See EVIDENCE, 9.
- PASSENGER: See COMMON CARRIER, 2.
- PAYMENT — *Continuing indebtedness.*] A note was paid when it became due with the proceeds of another note, made and indorsed by all the parties to the first note. *Held*, that it was a continuing indebted-

PAYMENT — *Continued.*

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ness; the debt secured by the first note was not paid, but merely transferred.

DUNLAP v. HAWKINS..... 292

2. ———, *Notes of a third person.*] Plaintiff sold defendant a buggy, and took as part payment the notes of a third person, upon the representation of defendant that the maker of the notes was solvent, and that if the notes were not paid, he (defendant) would pay them. *Held*, that the defendant was liable for the amount of the notes.

ALLEN v. BANTEL..... 342

3. ———, *Presumption of fact.*] Defendant's undertaking was evidence that the notes were not received as absolute payment; it was not necessary to be in writing, and plaintiff was entitled to commence action upon the non-payment of such notes at maturity, without an attempt to collect them of the maker. *Ib.*

*See PROMISSORY NOTES, 6.*

PENALTY: *See* EXCISE LAW.

PERSONAL PROPERTY: *See* SALE.

PLEADING — *amendment of — power of court to allow.*] Where the propriety of setting up a counter-claim first appeared upon a trial before a referee, *held*, that the defendant might, after the trial was suspended by an order staying proceedings, apply to the special term, on motion, and obtain an order permitting him to amend his answer by setting up that defense.

MITCHELL v. BUNN..... 486

2. ———, *Action for divorce — complaint.*] A complaint, in an action for divorce, alleged that the plaintiff was an inhabitant of this State, and had been so from the 10th of September, 1872, and then charged the defendant with acts of adultery committed between the 1st of January, 1870 and 1873. *Held*, that the averment was sufficient to constitute a proper cause of action for the consideration and action of the court, under the act of 1863 (Laws of 1862, ch. 246, § 1), and that conferred jurisdiction over the subject-matter of the action.

VON RHADE v. VON RHADE..... 491

3. ———, *Frivolous.*] In an action against a married woman, as indorser of a note, the answer put in issue the demand of payment and notice of non-payment, and averred that her indorsement was procured while under duress. *Held*, that the answer was not frivolous.

KLOTS v. FINCKE..... 580

4. ———, *Joinder of causes of action.*] The complaint contained a claim for moneys arising from the sale of plaintiff's property by defendant, which moneys were applied by defendant to his own use; and also a claim for moneys due upon an express contract. The first named claim was set forth as arising upon contract. *Held*, that the conversion of the moneys raised an implied promise to repay, and that the claim therefor was properly admitted to counterbalance a counter-claim of defendants.

LEACH v. LEACH ..... 657

5. ———, *Defense — In an action to annul marriage.*] In an action to annul a marriage between plaintiff and defendant, upon the ground that plaintiff had been previously married, and his wife was living at the time of his marriage with defendant, but had not been heard from by him, for more than five years; *held*, that it was no defense that defendant was induced to marry plaintiff by his representations that he had the legal right to contract marriage.

PRICE v. PRICE ..... 659

PLEADING — *Continued.*

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5. ———.] It is a proper matter of defense that the former wife was not living at the time of the bringing of the action. *Ib.*
7. ———, *Allegations in answer—materiality of.*] An allegation in the answer that defendant "has not knowledge or information sufficient to form a belief whether S. (the first wife) was living at the commencement of this action," *held*, a material allegation to join issue upon plaintiff's statement that "she is still living." *Ib.*
8. ———.] In the complaint, it was alleged that defendant had knowledge and information of the fact that plaintiff's former wife was living. *Held*, that a denial in the answer of this allegation, though not a perfect defense, was material, and might be necessary, upon the question of costs and alimony. *Ib.*
- See ANSWER; COUNTER-CLAIM; DEFENSE; ESTOPPEL, 2; LEASE, 2; PRACTICE, 1, 11, 14; TITLE.*

PRACTICE — *Demurrer — improper joinder of defendants — accounting.*]

Plaintiff and a number of others associated together for the purpose of operating in the stock of a railroad company. They appointed four of their number as managers, who were to buy and carry the stock until a specified time, when the stock was to be divided among the associates in specified proportions. The associates were to furnish the means in certain agreed proportions, and were to share the profits or losses in like proportions; the managers were to take title to the stock in their own names, and were to engage in certain transactions in respect to the stock for the mutual benefit of all, but were not to deal in the stock of the company in question upon their own individual account. At the time designated for terminating the agreement the managers represented that they had on hand a certain number of shares of the stock, which had cost a specified sum, and demanded of plaintiff and other associates that they should respectively take up and pay for their ratable proportion of shares, which demand was complied with by plaintiff. Plaintiff brought action against the managers and the other associates, setting forth, in his complaint, the foregoing facts, and alleging that the managers had violated their agreement not individually to deal in the stock, had improperly managed their trust, made improper charges and had not properly accounted; that upon a proper accounting between the managers and the associates, and between the associates themselves, a large sum of money would be found due the plaintiff, and prayed that an accounting be had from the managers, and between the associates. *Held* (INGRAHAM, P. J., dissenting), that plaintiff's right to an account was upon the facts stated against the managers alone. An adjustment having been made between the managers and plaintiff, and, presumptively, the rest of the associates, he cannot elect for the other associates to undo that adjustment merely because he is dissatisfied, and a demurrer to the complaint, upon the ground of an improper joinder of the associates with the managers, as defendants, should be sustained.

BOODY v. DREW.....

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2. ———, *Marriage of female plaintiff pending suit — abatement.*] Plaintiff, a woman, commenced an action and afterward married. The action was referred after issue was joined, and in the order of reference it was provided that the changed name of the plaintiff might be entered, without motion. At the trial before the referee, the defendant objected to proceeding on the ground of plaintiff's marriage. The order of reference was produced and the proceedings continued in the cause, as originally entitled. Subsequently, an *ex parte* order was entered by the clerk, under the direction of plaintiff's attorney, substituting plaintiff's name after for her name before marriage. *Held*, that under section 121 of the Code, there was no abatement of the action by

PRACTICE — *Continued.*

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reason of marriage of the plaintiff, until it should be so ordered by the court, and no such order having been obtained the proceedings after the marriage were regular.

MAPES v. SNYDER..... 818

3. —, *On appeal.*] When exceptions are ordered to be heard in the first instance, at general term, the party moving for a new trial is confined to the exceptions taken at the trial, and also loses his right of review upon the evidence embraced in the case.

SIEGEL v. SCHANTZ..... 353

4. —, *Exceptions first heard at general term.*] Where exceptions are ordered to be heard, in the first instance, at the general term, nothing can be passed upon but the exceptions themselves.

SHEAF v. U. & B. R. R. Co..... 383

5. —, *Affidavit and order for publication.*] An affidavit for obtaining an order for publication, which states that the defendant cannot be found within the State, although due search has been made for him, and that he is a resident of Berlin, Prussia, fails to comply with the requirements of the Code (§ 133) if it does not show what efforts have been made to find the defendant. But the defect will not deprive the justice of the power to make the order.

VON RHADE v. VON RHADE..... 491

6. —. An order for publication directed that the summons in the action should be published, and the copy summons, recited in the published order as being annexed, was not the summons which the order required to be published, but one requiring the defendant to appear and answer in six instead of twenty days. *Held*, that the fact that the order recited that a copy of the summons was annexed, when in fact it was not, in no manner qualified the direction or rendered it invalid. *Ib.*

7. —, *Service by mail.*] An order for service by mail required copies of the summons and complaint to be directed to the defendant at his place of residence, "Berlin, Germany." The direction was to him at the "Union Club, Berlin." *Held*, that, as the affidavit stated that this was his place of residence, it showed a substantial compliance with the order. *Ib.*

8. —, *Default.*] Jurisdiction of the person of a defendant having been acquired, it is not lost by the premature entry of his default, and a reference of the action for the purpose of taking the proofs. *Ib.*

9. —, *Judgment.*] Where the plaintiff in a divorce suit had, on the faith of the judgment therein, married an innocent third person: *Held*, that the judgment should be allowed to stand for their protection, until it should appear that the plaintiff had no right to the relief it had provided for her. *Ib.*

10. —, *trial by jury.*] After an equity case has been tried and finally submitted for decision, the court, at special term, has the power, of its own motion, to direct certain issues therein to be passed upon by a jury, if the case be one in which, under similar circumstances, the late court of chancery was authorized to direct a feigned issue.

BRINKLEY v. BRINKLEY..... 501

11. —, *feigned issue.*] The Code has not changed the former practice in respect to feigned issues, except so far as to substitute a simple interrogatory for the legal fiction of a wager. *Ib.*

12. —, *failure to reply.*] In an action to restrain defendant from bringing suits upon certain agreements made between him and plaintiff's agent, to cancel such agreements, and for an accounting, defend-

PRACTICE—*Continued.*

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ant set up a claim for expenses incurred on account of the agreements, and also damages arising from plaintiff's refusal to carry out the same. No reply was put in and no objection raised at the trial to the want of a reply. *Held*, that it was doubtful whether the failure to reply admitted the claim of defendant; but if it did the omission of defendant to object at the trial constituted a waiver of the defect in plaintiff's pleadings and the objection could not be raised on appeal.

HOLLOWAY v. STEPHENS ..... 562

13. ———, *Appealable order.*] An order refusing to grant a commission to take the testimony of a foreign witness affects a substantial right, and is appealable.

WALLACE v. AMERICAN LINEN THREAD COMPANY ..... 574

14. ———, *Irregular appeal.*] An appeal was made from an order directing judgment, and not from the judgment. *Held*, that respondent could avail himself of the irregularity only by a motion to dismiss the appeal.

KLOTS v. FINCKE ..... 580

15. ———, *Nonsuit—conforming pleadings to proof.*] The complaint set out a cause of action in trespass. At the trial, it appearing that the fee of the *locus in quo* was in the defendant, and that plaintiff had only an easement, the judge dismissed the complaint. *Held*, that whether, under the circumstances, the complaint should have been dismissed, or the pleadings conformed to the proof, was largely in the discretion of the trial judge, and that, in this case, it would not be interfered with.

BIRDSALL v. WILLIAMS ..... 605

16. ———, *Verdict subject to opinion of court at general term.*] On a trial at the circuit, the court directed a verdict for the plaintiffs, subject to the opinion of the court at general term, on a case. The court, at general term, set aside the verdict, upon the ground that plaintiff was not legally entitled to recover. Upon a motion for re-argument, *held*, that this was simply a mistrial; that the proper course was for the general term to review the proceedings and order a new trial, but the former decision having accomplished the same end a re-argument should be denied.

COOGAN v. MAYOR OF NEW YORK ..... 667

*See* ACTION; APPEAL; CERTIORARI; COSTS; INNKEEPER, 2; JUDGMENT; JUSTICE'S COURT; LIBEL; PARTITION; PARTNERSHIP, 9; PLEADING; TRIAL.

PREScription: *See* NUISANCE, 2.

PRESUMPTION OF FACT: *See* PAYMENT, 3.

PROCEEDINGS TO ACQUIRE TITLE: *See* EMINENT DOMAIN.

PROMISSORY NOTES — *Presentment and demand.*] A note was discounted and held by the bank where it was made payable. At the time it became due the maker had no funds at the bank for its payment. *Held*, that no formal demand of the maker was necessary under the circumstances, for the purpose of charging the indorsers.

FIRST NAT. BANK OF GROTON v. CRITTENDEN ..... 118

2. ———, *Notice.*] A notice was dated and mailed upon the next day after the note became due, and stated that the note was "this evening protested for non-payment, the same having been duly presented and payment demanded, which was refused." *Held*, that the notice was mailed in time, and was, in form, a good notice of demand and refusal, upon the day preceding. *Ib.*



PROMISSORY NOTES — *Continued.*

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3. ———, *Waiver.*] A promise by an indorser to pay an over-due note must be made with full knowledge of any defect in the demand and notice, in order to amount to a waiver of such defect (per P. POTTER, J.). *Ib.*
4. ———, *indorser — notice.*] The indorser of a promissory note received this notice: "The note given to Sarah E. Barnes by George B. Hutchins for \$100, dated the 24th day of May, 1866, is this day due; that if the note is not paid by Hutchins, she (Mrs. Barnes) will hold you for the note." *Held*, not sufficient to charge the indorser.  
BARNES v. BARRUS..... 390
5. ———, *indorsement — liability as between indorsers.*] Plaintiff agreed to sell to a firm certain property and to accept therefor the note of the firm, indorsed by M. A note payable to the order of plaintiff was made, and the indorsement of M. procured, M. being ignorant of the agreement between plaintiff and the firm. *Held*, that M. was not liable to plaintiff upon the note.  
HULL v. MARVIN..... 420
6. ———, *partial payment — what is not.*] Plaintiff left a note made by defendant for \$55.17 at a bank for collection. The note was not paid when due. After it had been overdue some days, and was still in possession of the bank, defendant's agent deposited with the bank a draft for \$20, directing that the same, when collected, be applied upon the note. The avails of the draft were credited to the agent and the note unpaid returned to plaintiff. *Held*, that the transaction between the agent and bank did not constitute a part payment of the note.  
WHIPPLE v. WALKER..... 456
7. ———, *Liability of seller of forged paper.*] Plaintiff bought of defendant a promissory note not due, purporting to be made by B, defendant declining to make himself responsible therefor. The note not being paid, plaintiff sued B, who set up that his signature was forged. Plaintiff asked defendant to prosecute the case, and gave him notice that he should hold him responsible for all costs if the note was proved to be forged. Defendant refused to prosecute, and, at the trial, the note was held to be forged. *Held*, that these facts established a cause of action against defendant; that the judgment of B was conclusive evidence, as to defendant, of the forgery of the name of B, and the amount of costs plaintiff had to pay him, and that defendant was liable to plaintiff for the amount paid for the note, and the costs and expenses he was subjected to on account of the action against B.  
BELL v. DAGG..... 628
8. ———, *Damages.*] *Held*, also, that in such an action, although no fraud is shown, the rule of damages is the same as it would be in an action upon an express warranty accompanied with fraudulent knowledge and representations. *Ib.*

PROVISIONAL REMEDIES: *See* ATTACHMENT, 2, 3.

PUBLICATION OF SUMMONS: *See* PRACTICE, 5, 6.

QUESTION OF LAW: *See* INTEREST, 4.

RAILROAD AID BONDS — *Tax payer withdrawing consent given — Laws of 1866, chapter 794 — powers of county clerk judicial.*] Certain tax payers of a town, constituting a majority in number and amount of those whose names appeared upon the last preceding assessment roll, filed with the county clerk their consents to the issue of the bonds of the town in aid of a railroad, under Laws of 1866, chapters 398 and 695, as amended by Laws of 1870, chapter 794, section 4. Afterward, and before the clerk made the affidavit required by the statutes, enough of those consenting to reduce the number below a majority filed their revoca-

RAILROAD AID BONDS—*Continued.*

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tion of such consents, and certain other tax payers appeared before the clerk and insisted upon his taking such revocations into consideration, and made certain offers of proof, and certain legal objections. The clerk, however, made his affidavit, holding that he could not take any other proof than the consents. *Held*, upon *certiorari*, reviewing the proceedings, that the power given to the clerk by the statutes in question, was judicial, and that he should have considered the revocations and received the proof.

PEOPLE *ex rel.* TOWN OF ROCHESTER v. DEYOE..... 143

2. ———, *Constitutionality of acts to bond towns.*] *Held*, also, that if the power was not judicial then the statutes conferring it were obnoxious to the provision of the constitution prohibiting the taking of private property without due process of law, and void. *Ib.*
3. ———, *Certificate of consent of tax paying corporation.*] The assessment roll contained the name "president, managers and company of the D. and H. C. Company." One of the consents filed was signed "the D. and H. C. Company, by Geo. Tallbot Olyphant, prest. p. t.," attested by a seal and witnessed by "Charles P. Hartt, treasurer." It was acknowledged by Hartt, who, after being described as treasurer of "the aforesaid corporation known and described as the president, managers and company of the D. and H. C. Company," deposed to his residence, "and that he is treasurer of said corporation; that he was personally present at the execution of the above written indenture, and saw the common and corporate seal of the said president, etc., duly affixed thereto, and the seal so affixed thereto is the common and corporate seal of the said, the president, etc., and that the above indenture was duly sealed and delivered by, and as and for the act and deed of the said, the president, etc., for the uses and purposes therein mentioned: that the name of this deponent, subscribed to the said deed as treasurer of the said corporation, in attestation of the due execution and delivery of said deed, is of this deponent's own, proper and respective handwriting; and that the name of George Tallbot Olyphant, president, p. t., of said corporation, also subscribed to the said deed in attestation of the due execution and delivery thereof, was so subscribed in this deponent's presence, and is of the said George Tallbot Olyphant's own, proper and respective handwriting." *Held*, insufficient, because, 1. It was not sufficiently shown that either "the president, managers and company of the D. and H. C. Company," or "the D. and H. C. Company" is a corporation. 2. It was not shown that the corporation possessed the power to execute such a consent. 3. Authority to affix the corporate seal was not shown. 4. Authority for the execution of the consent was not shown to have been given by the governing body of the corporation. 5. There was not sufficient evidence that "George Tallbot Olyphant" was the president, nor that the president *pro tem.* had power to execute such an instrument. *Ib.*
4. ———, *Identity of name.*] A consent by a person whose name differs from a nearly corresponding name upon the assessment roll, though the difference be slight, will be insufficient, unless there is evidence to show that the names represent the same person. *Ib.*
5. ———, *Authority to subscribe for stock conditionally—estoppel.*] A town authorized the issue of its bonds to the relator, in exchange for relator's stock, upon certain specified conditions. Three commissioners were appointed, and two of them made a subscription for relator's stock, absolute in form, but upon the representation of relator, and their belief that they could not be compelled to deliver the bonds of the town until they could make an agreement with the relator, in pursuance of Laws of 1870, chapter 507. Relator had not performed the conditions upon which the bonds were to be issued to it. *Held*,

RAILROAD AID BONDS — *Continued.*

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that the commissioners were not estopped by their subscription, and that relator was not entitled to a peremptory mandamus for the delivery of the bonds.

PEOPLE *ex rel.* U. C. & C. R. R. Co. *v.* HITCHCOCK..... 184

6. ———, *Official bond of commissioners.*] The offices of commissioners, appointed under chapter 730, Laws of 1873, are not vacated by their omission to make and file their official bonds, until ten days after notice from the supervisor of their town. *Ib.*

RAILROAD COMPANY: *See* CORPORATION, 1, 2.

RAILROADS — *defective cattle guards — animals wrongfully on highway.*]

Plaintiff's horses escaped from the pasture into the highway, and went from the highway through a defective cattle guard maintained by defendant on to defendant's railway track, where they were killed by a passing train. *Held*, that defendant was liable for the value of the horses. The defendant was bound to guard against animals wrongfully as well as against those rightfully in the highway; and the negligence of plaintiffs in permitting the horses to escape would not bar a recovery.

SHEAF *v.* U. & B. R. R. Co..... 888

2. ———, *defective fences — Negligence.*] A railroad company had not fenced their road at plaintiff's farm crossing, in accordance with the statutes. *Held*, that the company was liable for the loss of a steer which had passed in upon the company's track at such crossing, and was killed by one of the company's passing trains, and this liability did not depend on any consideration of negligence on the part of either party.

FANNING *v.* LONG ISLAND RAILROAD COMPANY..... 585

3. ———, ———,] To render a railroad company liable under Laws 1850, chap. 140, and 1854, chap. 282, for killing animals escaping through a railroad fence, temporarily out of repair, actual or constructive notice of such want of repair must be brought to the company, and its neglect to repair within a reasonable time shown.

WHEELER *v.* ERIE RAILWAY COMPANY..... 634

4. In an action against a railroad company for killing some sheep and a heifer, it was shown that the part of the fence through which the sheep escaped was known to the company to be out of repair before the escape, but there was no evidence that the fence was out of repair where the heifer escaped before such escape. *Held*, that the company was liable for the sheep but not for the heifer. *Ib.*

*See* NEGLIGENCE, 2.

REAL PROPERTY — *Excavations — damage to adjoining soil and buildings —*

*Laws 1872, chap. 786.*] The legislature, by a special act (Laws 1872, chap. 786), authorized the canal board to investigate the claim of a private firm for injuries done to the premises of said firm, by excavations made in repairing the canal, and if the facts proved were such as would create a legal liability, if proved, in a civil action against an individual, to award damages to such firm. It appeared that the employees of the State excavated alongside the wall of a building standing upon the extreme boundary of the premises of said firm, in consequence of which the soil under such wall fell out and let down the building. The soil was quicksand, and the proof was sufficient to justify a conclusion that the soil would have fallen out if no building had been erected upon the lot. *Held*, that an individual would have been liable for injury done to the adjoining lot, and the canal board were authorized to make an award of the damages under the act in question to the extent of the injury done to the soil, but not for the building.

PEOPLE *ex rel.* BARLOW *v.* CANAL BOARD (2)..... 275

REAL PROPERTY — *Continued.*

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2. ———. The whole amount allowed by the act was awarded. It did not appear distinctly what portion of the damages claimed by the firm was for injury to the building or what for injury to the lot alone. *Held*, that the award could not be set aside on that account. *Ib.*
3. ———, *Negligence — notice.*] The wall which fell was protected by substantial piling. The excavation was made more than two feet below and the earth removed for about seventy-five feet along and the excavation was left in that condition. *Held*, that there was evidence that the work was so negligently performed as to create a liability. *Held*, also, that the firm was entitled to reasonable notice of the intended excavation, in order to enable them to protect their building. *Ib.*

*See* CONTRACT, 2, 7, 13, 14; PARTNERSHIP, 12; VENDOR AND PURCHASER.

RECEIVER: *See* INSURANCE DEPARTMENT.

RECORDERS OF CITIES: *See* JURISDICTION, 1.

REFERENCE — *when compulsory not authorized — account.*] In an action upon a policy of insurance upon a single stock of goods, it appeared that such stock consisted of fifty-one items. *Held*, that the demand of the insured did not constitute an account such as to authorize a compulsory reference.

BRINK v. REPUBLIC FIRE INSURANCE COMPANY..... 550

2. ———, *Jury trial — waiver of right to.*] *Held*, also (BARRETT, J., *dissenting*), that by appearing and proceeding to trial under a compulsory order of reference, the party not consenting to the order did not waive his right to a jury trial. *Ib.*
3. ———, *Power of court on appeal.*] Plaintiff moved to vacate an order of reference upon the ground that the case had been finally submitted to the referee, and he had failed to make his report within the time limited by law. By the opposing affidavits and papers it appeared that the case had not been finally submitted and the motion was denied. Afterward plaintiff obtained an order to show cause why the same relief first applied for should not be granted. From an order denying plaintiff's second motion an appeal was taken. *Held* (BARRETT, J., *dissenting*), that the order of reference could be vacated upon the ground that the case was one in which a compulsory reference was not authorized, notwithstanding plaintiff did not make that a ground of his motion and had not appealed from the previous orders. *Ib.*
4. ———, *Findings of fact by referee — items of account.*] In an action where the parties had mutual claims against each other on account, the referee made a general finding in favor of the plaintiff, but gave no items of account. *Held*, that the referee should have required the parties to present their accounts in the form of debtor and creditor, and should, in his findings, have stated the items allowed distinctly. Every judgment rendered by a referee should rest upon facts warranting it, distinctly and explicitly found and stated.

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REFEREE: *See* FORECLOSURE, 1.

REFORMATION OF INSTRUMENT: *See* ACTION.

RELEASE — *Of contract under seal.*] A contract, under seal, may be released or modified by a parol agreement which is carried into effect.

JENKS v. ROBERTSON..... 255

2. ———.] J. S. contracted, under seal, to perform certain work for defendant. Defendant afterward, by parol, and for a valuable consideration, agreed to release J. S. from a performance of a part of the work. The

RELEASE — *Continued.*

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part of the work so released, defendant let to other parties, and J. S. performed the remainder. *Held*, that the release was valid. *Ib.*

3. ———, *Under seal — effect of.*] The respondents, legatees under the will of appellants' testator, executed and delivered to appellants as executors, in consideration of a part of the amount of their legacy, a release thereof under seal. *Held*, that thereby respondents extinguished their claim against the estate.

MATTER OF DURYEA v. MESSENGER..... 077

RELIGIOUS SOCIETY: *See* CORPORATION, 1; DEVISE.

REPAIRS: *See* LANDLORD AND TENANT, 2.

REPRAL: *See* MANSLAUGHTER.

REPLY: *See* PRACTICE, 12.

RESCISSION OF CONTRACT: *See* VENDOR AND PURCHASER.

RETURN DAY: *See* LANDLORD AND TENANT, 1.

REVIEW: *See* APPEAL, 1.

REVISED STATUTES CONSTRUED, EXPLAINED OR PASSED UPON:

Vol. 1, 502, 352; vol. 1, 841, §§ 7, 8, 112; vol. 1, 638, § 1, 173; vol. 1, 739, § 147, 849; vol. 1, 747, §§ 51, 52, 627; vol. 1, 749, § 4, 6; vol. 1, 758, § 9, 87; vol. 1, 759, § 15, 87; vol. 2, 173, 627; vol. 2, 234, § 48, 534; vol. 2, 354, § 18, 534; vol. 2, 411, § 13, 160; vol. 2, 415, § 33, 161; vol. 2, 474, 2, § 100, 432; vol. 2, 512, §§ 28, 29, 534; vol. 2, 662, § 36, 542; vol. 2, 702, § 32, 218; vol. 2, 704, § 1, 173; vol. 2 (2d ed.), 477, §§ 1, 2, 3, 442; vol. 3 (3d ed.), 990, § 43, 218; vol. 1 (5th ed.), 850, § 58, 21; vol. 2, 395, § 73, 362; vol. 3, 73, 541; vol. 3, 170, § 14, 464; vol. 3, 233, § 36, 561; vol. 3, 235, § 48, 561; vol. 3, 261, § 49, 541; vol. 3, 443, § 110, 363; vol. 3, 443, § 101, 368; vol. 3, 618, § 61, 484; vol. 3, 971, § 3, 511.

- SALE — *Personal property — conditional sale — title.*] It was agreed by parol, between the vendor and purchaser of certain machinery, that the title thereto should remain in the vendors until it was paid for. A note was given for the purchase-price. *Held*, that the agreement was valid, and that the title remained in the vendors, notwithstanding the giving of the note, and that they could not be divested of it by a transfer of the real estate upon which the machinery was located.

MCENTEE v. SCOTT..... 284

2. ———, *Deficiency in quantity and quality of articles sold.*] A railway company ordered from a firm of iron dealers a certain number of railway "frogs" of a specified quality. The firm sent a less number than that ordered, which was received without objection by the company. Upon using the frogs it was discovered that a portion of them were not of the quality ordered, but the company did not notify the firm of the defect, or offer to return the frogs, but kept the whole and used them. *Held*, that the company could not claim a deduction for the defective quality of the frogs, but were liable for the price agreed to be paid.

GURNEY *et al.* v. A. AND G. W. RAILWAY CO. .... 448

3. ———, *Duty of vendee.*] It was the duty of the vendee, when it discovered that one or more of the frogs delivered under the contract were not in compliance therewith, if it wished to reject any of the articles delivered, to notify the vendors of the alleged defect, and return or offer to return all the frogs embraced in the contract. *Ib.*

4. ———, *of personal property — delivery.*] Defendant agreed to manufacture and deliver to plaintiffs two printing presses and take in part payment therefor an old press. One of the presses was delivered, and

SALE — *Continued.*

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the amount due for both, after deducting the value of the old press, paid. The old press was not delivered to defendant, although plaintiffs were ready and willing to deliver it. *Held*, that the title to the new press, undelivered, had not vested in plaintiffs so as to entitle them to maintain an action against defendant for its possession.

SUTTON v. CAMPBELL..... 595

*See* CONSIGNOR AND CONSIGNEE, 2; CONTRACT, 2, 5, 6, 7, 13, 14, 15; DAMAGES; INJUNCTION, 2; VENDOR AND PURCHASER.

SCHOOL LAW — *orphan asylums — share of in school fund — Laws 1850, ch. 261.* The act of 1850 (chap. 261), relating to distribution of school moneys to orphan asylums, applies to asylums incorporated since its passage, and asylums are entitled to share in money raised by tax in school districts as well as in that raised by the State.

PEOPLE *ex rel.* ST. THOMAS ORPHAN ASYLUM v. GLOWACKI.... 436

2. ———, *Mandamus.*] In an application on behalf of an orphan asylum for a *mandamus*, to compel the trustees of a school district to pay to such asylum its share of the school money raised in such district, it appeared that no money had been raised by the district for the asylum, and that all the money in the hands of the trustees had been appropriated to specific purposes, and it did not appear that the asylum school had been taught by a duly authorized teacher. *Held*, that a *mandamus* ought not to issue. *Ib.*

SCIRE FACIAS: *See* PARTIES.

SEAL: *See* CORPORATION, 1.

SEALED INSTRUMENT: *See* RELEASE.

SEDUCTION — *indictment — election between charges.*] In an indictment for seduction under promise of marriage two offenses were charged, one as having taken place July 2, the other August 19. *Held*, that the refusal of the court at trial to compel the prosecution to elect upon which charge it would proceed could not be alleged as matter of error.

COOK v. PEOPLE..... 404

2. ———, *chastity of prosecutrix — evidence.*] The prosecutrix testified to the first offense charged. *Held*, that the admission of her testimony to prove the second charge was error. After the commission of the first offense she was no longer “chaste,” and the crime could not be committed as against her. *Ib.*

3. ———, *pregnancy.*] The existence of pregnancy is not essential to a conviction under the statutes in relation to seduction. *Ib.*

SETTLEMENT: *See* DEFENSE.

SET-OFF: *See* SUMMARY PROCEEDINGS.

SERVICE: *See* PRACTICE, 7.

SHERIFF — *Arrest and bail in civil action. Escape — re-arrest and surrender.*] Defendant, a sheriff, under an order of arrest in an action by plaintiff against G., arrested G. and took from him an undertaking signed by two sureties, who failed to justify upon being excepted to by plaintiff. G. escaped, and after judgment and executions returned unsatisfied, plaintiff brought an action for the escape. During the pendency of this action, defendant re-arrested G. and surrendered him in the county jail. *Held*, that defendant was exonerated from his liability upon paying the costs of the action.

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*See* ACTION, 1, 2; COUNTIES.

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**SLANDER—actionable words.]** These words: "He is no doctor; he bought his diploma for \$50," spoken of a person in his professional character, *held* actionable in themselves.  
**BERGOLD v. PUCHTA**..... 582  
*See EVIDENCE, 10.*

**SPECIAL PROCEEDING:** *See CERTIORARI.*

**STATUTE OF FRAUDS—promise to pay debt of another.]** T. employed defendant to construct a house, agreeing to furnish board for him and his workmen, and plaintiff contracted with T. to board them. After they had commenced boarding with plaintiff he informed defendant that he was not disposed to board them any longer on T.'s account. Defendant said "he would see it paid; if T. did not pay it he would."  
*Held*, a promise to pay the debt of another, within the statute of frauds.  
**RAWSON v. SPRINGSTEEN**..... 416  
*See CONTRACT, 14; EVIDENCE, 23.*

**STATUTE OF LIMITATIONS—Mutual accounts.]** In a complaint were set up as causes of action numerous promissory notes made by defendant and held by plaintiff, and in the answer, promissory notes made by plaintiff and held by defendant. *Held*, that such notes did not constitute a "mutual, open and current account" within § 95 of the Code, so as to prevent a part being barred by the statute of limitations. The provision in § 95 was not intended to embrace mere cross-demands, but only a mutual, open and current account that is unliquidated.

**PERRINE v. HOTCHKISS**..... 370

2. ———, *Fraudulent conveyance.*] Plaintiff, as assignee of a judgment against W., brought action in 1871, to set aside as fraudulent a conveyance of real estate made by W. in 1862. It appeared that plaintiff's assignor had notice of the conveyance, and its character, in 1862. *Held*, that the action was barred by the limitation contained in Code, § 91, subd. 6.

**TAFT v. WRIGHT**..... 614

3. ———, *Assignment for benefit of creditors.*] After the judgment in question was obtained W. made an assignment under the statute, for the benefit of his creditors. *Held*, that the judgment creditor was entitled notwithstanding such assignment to bring action to set aside the conveyance as fraudulent. *Ib.*

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*See REVISED STATUTES CONSTRUED, ETC.*

**STATUTORY CONSTRUCTION**—*Laws 1870, chap. 190 — New York City.*] By the provisions of Laws of 1870, chap. 190, all moneys drawn from the treasury of New York, for county expenditures, "shall be upon vouchers examined and allowed by the auditor, and approved by the comptroller." *Held*, that the auditor and comptroller were not authorized to examine and pass upon the claims themselves, but upon the vouchers only. The board of supervisors acts judicially in reference to charges against the county, and its action is final and conclusive. The duty of the auditor and comptroller is limited to a ministerial examination and approval of the vouchers, and where a claim has been properly allowed by the board of supervisors the claimant is entitled to mandamus to compel the examination and allowance of his vouchers by the auditor and their approval by the comptroller.

PEOPLE *ex rel.* BROWN *v.* GREEN (No. 1.)..... 18

2. —, *Mandamus.*] Such claimant would not, however, previous to such examination, allowance and approval, be entitled to mandamus to compel the comptroller to pay the claim. *Ib.*
3. —, *New York city board of audit — Laws 1870, chaps. 137, 383; 1871, chap. 213.*] The relator furnished a quantity of water-meters under a contract with the city of New York, made through the commissioner of public works, under a special provision of chap. 383, Laws 1870, § 13. By chap. 213, Laws 1871, § 5, the comptroller of New York city is directed to raise on revenue bonds such amounts as may be necessary to meet the expenses incurred in procuring, connecting and setting the meters, and to "pay for the same, on the requisition of the said commissioner of public works." *Held*, that the requisition of the commissioner was not final as to the right of the relator to compensation, nor was the comptroller upon its presentation bound to pay the sum named. The provision of the act of 1871, directing the comptroller to raise the money and pay for the meters, did not repeal §§ 37 and 39, Laws of 1870, chap. 137, which established an auditing bureau, and declared that moneys drawn from the city treasury should be upon vouchers examined and allowed by the auditor and approved by the comptroller.

PEOPLE *ex rel.* NAVARRO *v.* GREEN..... 62

4. —.] *Held*, also, that a return by the comptroller to a mandamus to compel payment for such meters, that the sum claimed for the meters was not due, that the meters were not made of the best quality of brass, and were not such as were agreed to be furnished, etc., and that



STATUTORY CONSTRUCTION — *Continued.*

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- the contract between the relator and the city was entered into by fraud and covin, were material, and could not be stricken out. *Ib.*
5. —, *Mandamus.*] The contract made with the city and the debt due under it could be enforced by action. But it did not necessarily follow that the relator was not entitled to mandamus to enforce his claim. In case a proper audit had been made and the comptroller refused to pay, mandamus might properly issue. *Ib.*
6. —, *New York city — department of docks — power of, as to piers and wharves.*] The acts of the legislature passed in 1870 (chaps. 187, § 99; 883, § 32, etc.), and 1871 (chap. 574, § 6), providing that the department of docks in the city of New York shall have exclusive charge and control of the wharves, piers, bulk heads and structures thereon, etc., conferred upon said department only the authority which had been conferred previously upon the corporation and its officers connected therewith, and others in relation thereto, and does not authorize such board to allow such use of the piers as to exclude the public from their enjoyment of it as a highway or public street.
- PEOPLE v. MALLORY ..... 76
7. —.] The commissioners of the department of docks issued a permit to defendants allowing them to erect on pier 20, E. R., a shed for their private use. *Held*, that such permit was not authorized by law, and an injunction would issue to restrain the erection. *Ib.*
8. —, *Laws of 1870, chap. 429; 1855, chap. 427 — unpaid taxes — collection of — impracticable statute not void.*] By chap. 454, Laws of 1860, and acts amendatory thereto, sales of lands for unpaid taxes in Westchester county are required to be made at the court-house in Westchester county, and personal notice of such sale given to mortgagees residing in Westchester and adjoining counties. By chap. 429, Laws of 1870, the acts relating to Westchester county are made applicable to Richmond county. *Held*, that the meaning of the last-named act is that the sales shall be made at the court-house in Richmond, not at that in Westchester county, and the notices given personally to residents of Richmond and adjoining counties. *Held*, also, that even if the intention of the act was to have the sales take place in Westchester it would not render the act nugatory. The court cannot annul a statute merely because its execution is difficult, or a literal interpretation would produce impracticable results.
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9. —.] The legal effect of the act of 1870 (chap. 429) is to supersede as to Richmond county the act of 1855 (chap. 427). *Ib.*
10. —.] *Laws 1871, chap. 639 — grant of oyster beds.*] By Laws 1871, chap. 639, the board of town auditors of either Hempstead or Jamaica, Queens county, may grant to residents of those towns the occupancy of lands under water, for oyster planting. By the statute the applicant is required to prove to the board, among other things, by five "freeholders," that he is and has been for one year preceding an "inhabitant of the town." The proof is required to be taken in writing, and signed and sworn to, whereupon the board may grant permission to occupy; the certificate of which, and the depositions, are directed to be filed in the town clerk's office. *Held*, in an action by one holding a certificate, for a penalty provided by the act for taking oysters without authority on lands granted, that the proof required by the act is common-law proof. The witnesses of the facts should be produced before the board, sworn and examined; and an affidavit taken before one of the justices who was one of the

- STATUTORY CONSTRUCTION — *Continued.* PAGE.
- board did not give the board jurisdiction to grant the right of occupancy. *SOUTHARD v. WRIGHT*..... 674
- See* ACTION, 2; ASSESSMENT; CERTIORARI; EXCISE LAW; HIGHWAYS, 4; MANSLAUGHTER; MECHANICS' LIEN; NEW YORK CITY; RAILROAD AID BONDS; RAILROADS; SCHOOL LAW, 1; WILL, 11.
- STAY OF PROCEEDINGS: *See* ACTION, 4.
- STIPULATIONS: *See* CONTRACT, 2.
- STOCK BROKER'S CONTRACT: *See* INJUNCTION, 2.
- STOLEN BONDS — *Liability of purchaser — good faith — finding of jury.*  
In an action to recover the value of government bonds stolen from the plaintiff, and shown to have been subsequently purchased and sold by defendants, a firm of brokers, evidence was given on behalf of plaintiff that a hand-bill announcing the loss of the bonds and describing them, had been left with the firm, and the attention of the managing partner called thereto, and that he read the hand-bill. The evidence on behalf of the defendants was proved to be in part untrue, and it was contradictory. *Held*, that the submission to the jury of the question of good faith on the part of the defendants in dealing in the bonds, was proper, and the jury were justified in finding that defendants acted in bad faith, and were liable.  
*LORD v. WILKINSON*..... 179
- STREETS: *See* NEW YORK CITY, 1.
- SUMMARY PROCEEDINGS — *Set-off.* The statutes relating to the allowance of set-off and counter-claim have no application to proceedings under the statute for the removal of tenants for non-payment of rent. They are solely applicable to actions, and to such actions only as are mentioned in the statutes. Accordingly where it was shown that a tenant had tendered one-half of the rent due and had a claim against the landlord for an amount equal to the balance, *held*, that such tender and claim did not constitute a legal answer to the affidavit of the landlord that the rent was not paid.  
*PEOPLE v. WALTON*..... 533  
*See* LANDLORD AND TENANT, 1.
- SUMMONS: *See* LANDLORD AND TENANT, 1.
- SUPREME COURT RULE 85: *See* PARTITION.
- SURETY: *See* LESSOR AND LESSEE.
- SURVIVORSHIP — *Construction of will.* J. S. loaned defendant \$5,000, taking therefor a note of defendant payable to J. S. and plaintiff, his wife, jointly. Afterward J. S. was declared insane, and a committee of his estate was appointed to whom plaintiff delivered the note. Subsequently J. S. died, leaving a will in which was a specific bequest to plaintiff which was declared to be in lieu of dower and every claim against the testator's estate. Afterward the note was given up to plaintiff, who was executor under the will, and she gave a receipt in which the note was described as belonging to the estate. There was evidence that the testator did not intend to give the note in addition to the bequest. *Held*, that upon the face of the note plaintiff was the owner of it, and this conclusion could be overcome only by evidence of a transfer to J. S., and such transfer did not appear. *Held*, also, that evidence of the intent of J. S. as to the disposition of his property could not change the will, there being no latent or patent ambiguity therein  
*SANFORD v. SANFORD*..... 641

SURVIVORSHIP—*Continued.*

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2. ———, *Estoppel.*] *Held*, also, that the acts of the plaintiff, in relation to the note, did not estop her from claiming title. *Ib.*
3. ———, *Evidence.*] Evidence was given in explanation of her acts, showing that plaintiff was ignorant of her rights. *Held*, admissible. *Ib.*

TAXES: *See* STATUTORY CONSTRUCTION, 8.

TAX PAYER: *See* RAILROAD AID BONDS, 1, 2, 3, 4.

TENANT: *See* LANDLORD AND TENANT.

TENANTS IN COMMON — *Liability of tenant to co-tenant for improvements to land held in common—admission of and promise to pay.*] Plaintiff, defendant and others were shareholders in a joint-stock enterprise to purchase and improve lands containing a mineral spring, and held such lands as tenants in common. Plaintiff made and paid for certain improvements, and assessed the cost, ratably, upon each shareholder. Plaintiff proved that he made a statement to defendant of the amount assessed upon him; that defendant took the figures on a paper, and said he "would pay him (plaintiff) the money;" would "be over in a few days and settle up—square up." *Held*, that the admission of a liability, coupled with a promise to pay, was sufficient to authorize a recovery by plaintiff against defendant  
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TENDER: *See* CONTRACT, 12; FORECLOSURE, 4; SUMMARY PROCEEDINGS.

TENURE OF OFFICE: *See* CONSTITUTIONAL LAW.

TESTIMONY: *See* COMMISSION.

TIME: *See* MECHANIC'S LIEN.

TITLE — *To deposits. Pleading—demurrer.*] D. deposited money with defendant in the name of "D. for C.," and took a note payable to "D. for C." *Held*, that this was a complete change of the title to the money. D. became a trustee for C., and after the death of D., a complaint in an action in equity by C. to obtain possession of the money, setting forth the above facts, was not demurrable.

SMITH *v.* LEE..... 591

*See* SALE, 1, 4; WRONGFUL CONVERSION.

TOWNS — *Town bounties—mandamus.*] At a special town meeting held in the town of Pittsfield, January 2, 1864, a resolution was passed that \$610 bounty should be paid to every person enlisting "from the town of Pittsfield," as a volunteer in the army, and credited to the quota of that town. Plaintiff's intestate, who resided in another town, enlisted and was credited to the quota of Pittsfield. Said intestate received a certificate of said enlistment and credit from the proper authority, which certificate was presented to the town auditors, and payment of the bounty demanded, in accordance with Laws of 1864, chap. 8. Payment was refused. After intestate's enlistment he was, without his own consent, transferred to the credit of another town. In an action against the town for such bounty, the town set up several grounds of defense. *Held*, that the plaintiff's remedy was by action and not by mandamus. The rule is well settled that mandamus will only lie to give effect to a clear legal right.

NORTHUP *v.* TOWN OF PITTSFIELD.... 108

2. ———.] *Held*, also, that although the proceedings before and at town meeting might have been legally defective, the provisions of Laws of 1864, chap. 8, § 1, though passed after such meeting, cured the defects and rendered the action of the meeting valid. *Ib.*
3. ———, *Enlistments of non-residents—transfer of credit.*] The non-residence of the intestate did not affect the liability of the town for the

TOWNS — *Continued.*

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bounty. Neither did the transfer of the credit, without the consent of intestate, to another town. *Ib.*

*See RAILROAD AID BONDS.*

**TRIAL — *Right to jury — Dower.*** In an action for admeasurement of dower, the defense was that plaintiff had, by an ante-nuptial agreement, released her claim to dower. *Held*, that defendants were entitled to a trial by jury.

KINNE *v.* KINNE *et al.* ..... 898

2. ———, *Justice of sessions a witness.* A justice of the sessions, while sitting at a trial, was called as a witness in the cause, and gave material testimony. *Held*, that, while the justice was thus acting as a witness, the court was disorganized, and a conviction upon that trial was irregular.

DOHRING *v.* PEOPLE ..... 458

8. ———, *Nonsuit.* Plaintiffs, in their complaint, claimed to have been employed by the defendants as brokers, to sell a vessel. On the trial, plaintiffs failed to show original employment or a ratification of their acts done without authority. *Held*, that plaintiffs should have been nonsuited.

SMITH *v.* TYLER ..... 669

4. ———, *Dismissal of complaint — neglect to request submission to jury.* Defendant made a draft on plaintiffs. The draft was accompanied by a bill of lading of some cheese consigned to plaintiffs. Plaintiffs accepted and paid the draft, and sold the cheese, which did not bring enough to meet the draft. In an action for the deficiency, the defense was that the cheese had been sold to plaintiffs' agent for the amount of the draft. Plaintiffs claimed to have received and sold the cheese on commission. Evidence was given tending to prove the allegations upon each side. *Held*, that a motion to dismiss the complaint was properly denied, and that the defendant not having requested the submission of the case to the jury, could not object, on appeal, to a verdict for plaintiff, found by direction of the court.

PERREN *v.* LEWIS ..... 661

*See CRIMINAL LAW, 1; PRACTICE, 10, 16.*

**TROVER:** *See CONVERSION; WRONGFUL CONVERSION.*

**TRUSTS — *When void.*** A testator left a portion of his estate "to the care of my wife, to be disposed of as she shall see fit, in charitable purposes." *Held*, that this was an attempt to create a trust not authorized by the laws of this State, and the provision was void.

LEFEVRE *v.* LEFEVRE ..... 830

*See FRAUDULENT CONVEYANCE, 6.*

**UNDERTAKING:** *See ATTACHMENT.*

**UNDUE INFLUENCE:** *See FRAUDULENT CONVEYANCE, 8; PARTNERSHIP, 4, 7; WILL, 4.*

**USURY — *evidence.*** Defendant obtained a loan from plaintiff through G. & V., a firm of attorneys. At the time, defendant executed a bond and mortgage for \$5,666 and interest, and gave a certificate in writing that he had employed G. & V. to procure a loan of \$5,666 for him and had agreed to pay them for their services \$566. Defendant only received \$5,100. In an action to foreclose the mortgage, the defense was usury. *Held*, that the written certificate was not conclusive as to defendant, and he was entitled to show by G. whether the plaintiff shared in the amount paid to G. & V. for their services.

VAN SICKLER *v.* PALMER ..... 613

**VENDOR AND PURCHASER — Rescission of sale — purchase-money — use and occupation.]** Plaintiff agreed, by parol, to purchase a house from defendant, took possession of the same, and paid part of the purchase-money. Afterward the sale was rescinded by mutual agreement, and defendant took possession of the premises. *Held*, that plaintiff was entitled to recover the purchase-money paid, and defendant to recover for the use and occupation of the premises by plaintiff.

THRASHER v. BENTLY ..... 309

*See* CONTRACT, 2, 7, 13, 14; SALE.

**VENDOR AND VENDEE:** *See* SALE.

**VERDICT:** *See* JUSTICE'S COURT; PRACTICE, 16.

**VICIOUS ANIMAL:** *See* ANIMALS.

**VOLUNTARY DEED — When not fraudulent.]** H., being in debt, purchased real estate and caused the title to be taken in his wife's name. At the time, he was indebted in the amount of \$6,400, and owned property worth \$9,700, independent of the amount paid for the real estate. *Held*, that the conveyance to the wife was not fraudulent as to the creditors of H.

DUNLAP v. HAWKINS ..... 292

*See* FRAUDULENT CONVEYANCE, 1, 5, 6.

**WAIVER — Estoppel.]** J. S. having a contract to perform certain work for defendant, which provided among other things, that the contract should not be assigned without the written consent of defendant, assigned said contract without such written consent to plaintiff. Plaintiff performed the work and the defendant, knowing of the assignment, delivered to him estimates, paid him upon his own receipt, and otherwise treated him as assignee without making objection to the assignment. *Held*, that defendant was estopped from claiming that the assignment was invalid.

JENKS v. ROBERTSON ..... 255

*See* CONTRACT, 4; INSURANCE, 3, 4, 16; PROMISSORY NOTES, 3; REFERENCE, 2.

**WARRANTY:** *See* EVIDENCE, 23, 24.

**WASTE — Growing timber.]** In an action by the owner of the fee of a farm, against the lessee of the tenant for life for waste, the alleged waste consisted in cutting growing timber for fuel. At the trial the court charged that if the trees which were down were unfit for fuel, or would cost more than their value to secure them, the defendant was not bound to take them. *Held*, correct. The tenant for life of farming land is entitled to cut down and use so much of the standing timber therein as may be necessary for fuel, etc., and is not compelled to cut timber which may cost more than its value to secure.

RUTHERFORD v. AIKEN ..... 281

2. ———, *Evidence — intent.]* The complaint alleged that the defendant maliciously cut the timber, and the plaintiff sought a forfeiture and eviction. *Held*, that defendant was entitled to testify that he cut the wood in good faith, believing he had a right to do so. *Ib.*

*See* EVIDENCE, 8, 11.

**WHARVES AND PIERS:** *See* STATUTORY CONSTRUCTION, 6, 7.

**WILL — execution of.]** In proceedings to prove a will, the evidence showed that the will was read in the presence of the testator and the subscribing witnesses by a person who, at the time, asked the witnesses to witness the execution. The testator then subscribed the will, and the witnesses at the same time signed their names to attest the execu-

WILL — *Continued.*

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tion. *Held*, that there was sufficient proof of the due execution of the will.

BELDING v. LEICHARDT..... 52

2. ———, *Publication by testator.*] Although the request to witness the execution and the publication of a will are distinct acts in their nature, their performance may be joint or connected. A single sentence uttered by the testator may import both a request to attest the execution and a publication. *Ib.*

8. ———, *Construction of — "estate."*] A will contained the following provision: "I give and bequeath to G. S. B. my stone store and \$10,000 in money out of my estate." The testator's personal property was insufficient to pay the legacy, but he left valuable real estate, more than sufficient for that purpose. By a clause in a codicil to the will, he directed his executors to sell as much of his *real estate* as in their discretion and judgment should be for the best interest of "my estate;" also, that certain of his "real estate" should not be sold until necessary for a final settlement of "my estate." There was no residuary devise. *Held*, that by the term "my estate," the testator intended all his property, both real and personal, and that, after exhausting the personal property, the remainder of the legacy should be paid from the real estate.

TAYLOR v. DODD..... 88

4. ———, *Undue influence — evidence.*] A testator left surviving him a widow and a son by a former marriage. By his will he gave all his property, amounting to \$5,330, to his widow, except a legacy of \$25 to his son, and one of like amount to the widow of a deceased son. It was shown that the testator was a man of strong will and decided character and determined to have his own way; that his wife and son were not on good terms, and she had, on some occasions, complained of her treatment by the son in the presence of testator, and had also declared her belief that the son was dishonest in his dealings with testator. It was also shown that the will was drawn under testator's directions, and his wife was not present at the time; that his mind was clear, and that he gave at the time satisfactory reasons for the disposition made of his property, viz.: that the son had more property than he himself had, that the deceased son's widow had friends that would take care of her; that he had no more property than he ought to leave to his wife; that his wife had been kind to him and prolonged his days, etc. It was shown, also, that testator had expressed himself as dissatisfied with the conduct of his son to himself and wife, and had, shortly before his death, stated such conduct as one of the reasons for the provisions of the will. *Held*, that there was no evidence of undue influence on the part of the wife; that no inference of such influence could be drawn from the complaints made by her concerning the son's conduct; nor could such an inference be drawn in such a case as this, from the fact that the wife was the donee of the whole estate; and that the will was entitled to admission to probate.

BICKNELL v. BICKNELL..... 96

5. ———, *Construction of — legacies — when vested.*] A will provided that the executor should convert the real and personal estate into cash, and that if, after the payment of debts and legacies, "there shall remain an amount, not exceeding \$20,000, that then my said executor pay over the whole of said amount so remaining" to a religious society; "but in case the amount of said moneys so remaining shall exceed \$20,000, then my executor shall pay" to said society "only \$20,000, and that he pay over the residue thereof to my nephews and nieces who shall then be living, to be equally divided between them." After the payment of the \$20,000 there was a surplus. At the testator's death there were fourteen of his nephews and nieces living. One

WILL — Continued.

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niece died about a year after the death of testator, and another about two years after, but before final distribution. *Held*, that the shares of the nephews and nieces vested at the time of testator's death, and the representatives of the deceased nieces were entitled to share in the distribution.

MCKINSTRY v. SANDERS..... 181

- 6 ———.] The law favors the vesting of estates, and unless the intention is unequivocally expressed to the contrary, it will not be imputed to the testator. *Ib*.

7. ———, *Construction of — remainder, when it vests.*] A will contained the following: "It is my will, and I hereby direct that so much of my estate shall be safely invested on interest as will produce an annual income of \$600, and that the same be kept so invested by my executors and the interest paid to my said wife, annually or semi-annually, for and during her natural life, in the manner directed in and by the second item of this, my said will, and after the decease of my said wife, Mary Ann, the said principal sum to be equally distributed among my heirs at law." One of the testator's sons, living at testator's death, died before the death of his mother, leaving a widow, his administratrix, but no children. *Held*, that the principal vested in the testator's children at his death, and that, upon the death of the mother, the son's widow was entitled to his share as his representative.

STOWELL v. GRAVES..... 211

8. ———, *Construction of — misnomer of legatee.*] A testator gave a bequest to the "Home of the Friendless, in New York." There was no institution of that name, but the American Female Guardian Society was proved to be frequently called by that name, and to have been so called by the testator while living. *Held*, that the said society would take the bequest.

LEFEVRE v. LEFEVRE..... 830

9. ———.] The testator gave a bequest "to the Presbyterian Society of Carthage," another "to the Methodist Church of Carthage," and another "to the Baptist Church," without adding the words "of Carthage." It was proved that there was in Carthage only one Presbyterian Society, one Methodist Society, and one Baptist organization. These bodies were incorporated under names different from the names used by testator. *Held*, that the Presbyterian and Methodist Societies would take under testator's will, but the Baptist organization would not. *Ib*.

10. ———, *Execution of — conflict in testimony.*] One of the subscribing witnesses to a will testified to the due execution of the will, while the other witness denied that all the statute requirements were complied with. *Held*, that the surrogate was justified in admitting the will to probate.

KINNE v. KINNE et al..... 891

11. ———, *Statutory construction.*] The legal effect of the statutes in relation to wills made in other States (Laws 1864, chap. 311; 1872, chap. 680) is to make an exemplified copy of such a will, and the proofs thereof, when recorded, equivalent to proof of the will in this State.

BROMLEY v. MILLER..... 575

12. ———, *Will of non-resident — proof of — power to executors to convey real estate.*] A resident of New Jersey, in her will, gave her executors power to convey her real estate. The will was proved in New Jersey and an exemplified copy, with the proofs certified by the surrogate of the county where the testator resided, recorded in the office of the

WILL—*Continued.*

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surrogate of Kings county. *Held*, that a conveyance by the executors of testator's real estate in Kings county was valid. *Ib.*

*See* SURVIVORSHIP, 1; TRUSTS.

WITNESS—*order for examination under Code, § 401.*] Plaintiff, for the purpose of opposing a motion, required the affidavit of D. as to facts within the knowledge of D. He applied to D. several times upon successive days, but D. each time declined to make the affidavit until he could consult his counsel. *Held*, sufficient to authorize an order for the examination of D. under Code, § 401.

ROGERS v. DURANT..... 676

*See* EVIDENCE, 6, 7, 16, 17, 19; LIBEL; TRIAL, 2.

## WORDS:

"ALTERATION:" *See* HIGHWAYS.

"CAVEAT EMPTOR:" *See* STOLEN BONDS.

"EMPLOYEE:" *See* EMPLOYEE.

"ESTATE:" *See* WILL.

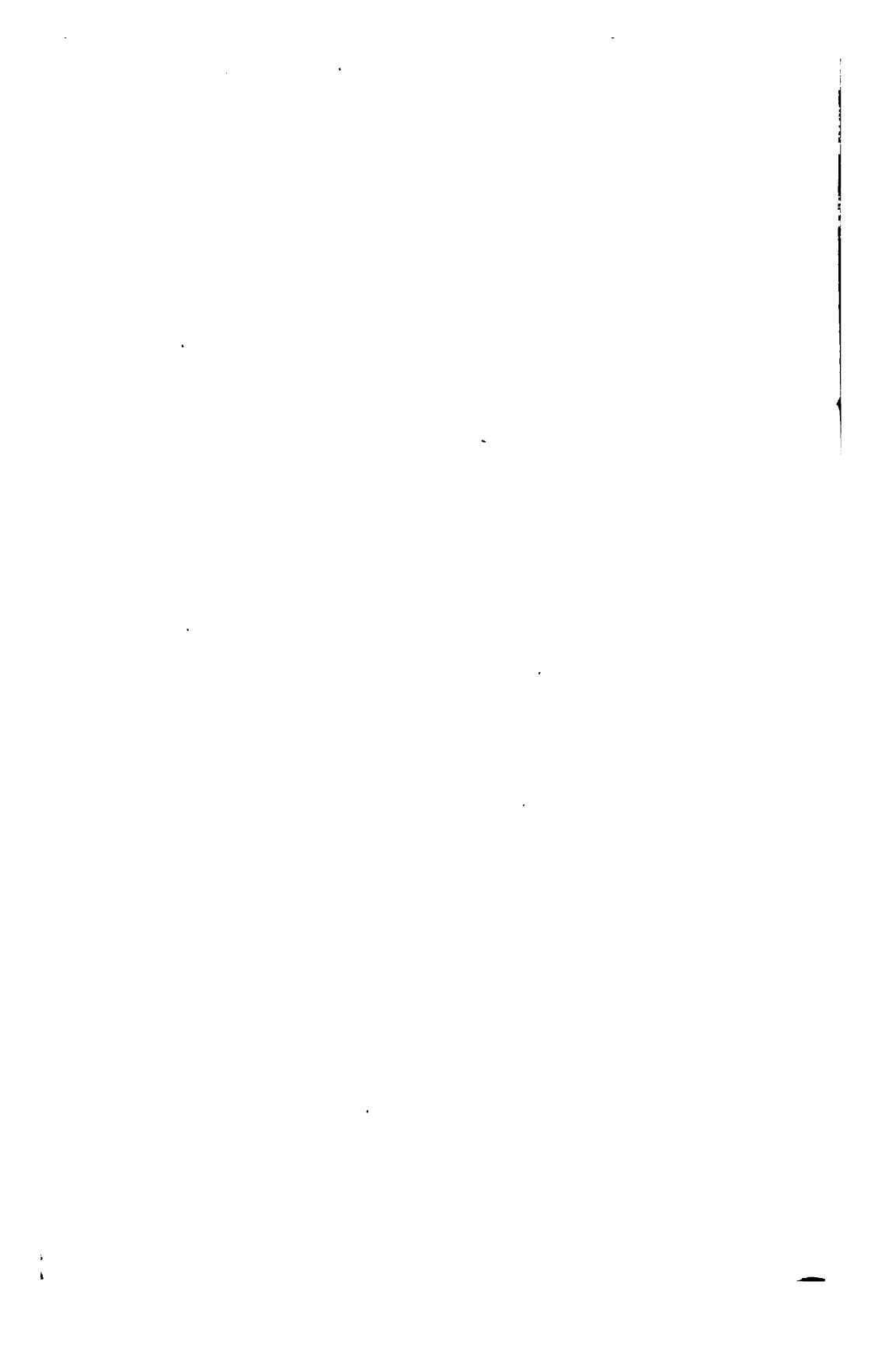
WRONGFUL CONVERSION—*title.*] Certain drafts, sent to the State treasurer by county treasurers, in payment of taxes, and being in the State treasury, were wrongfully converted by the defendant, who showed no title in himself. *Held*, that he was a mere wrong-doer, without title; and that the possessory title of the people was sufficient to sustain an action for the conversion of the drafts.

PEOPLE v. SHERWIN..... 529

*See* CONVERSION.

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